In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SUGAR DADDY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, but only if a petition for a writ of certiorari is filed and granted in the case of *Adolph Weinberg, et al.* v. *Commissioner,* which involves the same judgment.

OPINIONS BELOW

The opinion of the Tax Court (R. 459–485) [1] is reported at 44 T.C. 233. The opinion of the court of appeals (Appendix, pp. 5–6, *infra*) is reported at 386 F. 2d 836.

[1] "R." references are to the record on review in the court of appeals.

297-717—68

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1967 (Appendix, p. 6, *infra*). On February 14, 1968, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including April 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Assuming *arguendo* that the court of appeals erred in holding that income from farming operations should be included in the income of two individual taxpayers rather than in the income of their twelve wholly owned corporations, whether the corporations are then entitled to one or to twelve surtax exemptions.

STATEMENT

This is a consolidated income tax case involving two individual taxpayers and their twelve wholly-owned corporations. The individuals claimed to have transferred growing farm crops on land they owned to the corporations, which allegedly sold the crops. The corporations reported the gains on the sales as corporate income. The Commissioner asserted deficiencies against the individuals on the ground that they, rather than the corporations, had realized the income. For protective purposes, the Commissioner also asserted deficiencies against the corporations, on the theory that if they realized the income, they were entitled to only one surtax exemption rather than the separate exemption each had taken.

The Tax Court upheld the Commissioner's determination that the individual taxpayers should have reported the income from the sale of the crops, and that the corporations therefore were not liable for tax on the income they had reported; it thus did not reach the Commissioner's alternative contention. *Weinberg, et al. v. Commissioner,* 44 T.C. 233. The individual taxpayers sought review in the Court of Appeals for the Ninth Circuit, and the Commissioner filed protective cross-petitions for review of the decisions in favor of the twelve corporations. On November 28, 1967, the court of appeals affirmed the Tax Court. The individual taxpayers sought rehearing; which the court denied on January 18, 1968. On March 31, 1968, Mr. Justice Douglas granted the individual taxpayers an extension of time until May 4, 1968, to petition for certiorari.

REASON FOR GRANTING THE WRIT

This petition is filed to protect the revenue in the event that this Court grants the petition for a writ of certiorari which we understand the individual taxpayers intend to file.[2] If the courts below correctly held, as we believe, that the proceeds from the sale of the growing crops should be included in the individual taxpayers' income, then those courts properly determined that the corporations were without any tax liability in the years involved. If, however, this Court were to rule that the individuals did not realize the income from the sale of the crops, then the Court

[2] The Commissioner intends to oppose any such petition.

should also restore that income to the taxpayers' twelve wholly-owned corporations and remand the case for determination of the alternate contention of the Commissioner which was not passed upon by the courts below—*i.e.*, that the corporations were entitled to only one surtax exemption.

CONCLUSION

If this Court should grant the petition for certiorari the individual taxpayers intend to file in *Weinberg* v. *Commissioner*, this petition should also be granted; but if certiorari is there denied, or no petition is filed, this petition should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 21213

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SUGAR DADDY, INC., ET AL, RESPONDENTS

ADOLPH WEINBERG, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SUGAR DADDY, INC., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

[November 28, 1967]

Petition to Review a Decision of the Tax Court of the United States

Before: BROWNING and ELY, Circuit Judges, and FOLEY, District Judge

PER CURIAM:

Taxpayers seek review of the decisions entered pursuant to the opinion of the Tax Court reported at 44 T.C. 233 (1965). The government concedes that the Tax Court erred in including income of E T Farming Company in the taxpayers' income. In all other respects we affirm the Tax Court's decision, on the ground that the Tax Court was not clearly wrong in

determining that the taxpayers failed to establish that they had transferred growing, unharvested crops to the taxpayers' twelve corporations rather than transferring to the corporations proceeds from the sale of those crops.

Remanded for recomputation under Rule 50 in accordance with this opinion.

U. S. Court of Appeals, San Francisco, Calif.

Filed: on Dec. 8, 1967

United States Court of Appeals for the Ninth Circuit

No. 21213

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SUGAR DADDY, INC., ET AL., RESPONDENTS

ADOLPH WEINBERG, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SUGAR DADDY, INC., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JUDGMENT

Upon Petition to Review a Decision of the Tax Court of the United States, ----------.

This Cause came on to be heard on the Transcript of the Record from the Tax Court of the United States, ---------- and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decisions of the said Tax Court of the United States in this Cause be, and hereby are affirmed in part and remanded to the said Tax Court for recomputation under Rule 50 in accordance with the opinion of this Court.

Filed and entered Nov. 28, 1967.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 1389

ADOLPH WEINBERG and ETTA WEINBERG,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1967
No. .....

ADOLPH WEINBERG and ETTA WEINBERG,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 28, 1967.

Opinions Below

The opinion of the Court of Appeals, printed in Appendix A hereto, is reported in 386 F. 2d 836. The opinion of the Tax Court, printed in Appendix B hereto, is reported in 44 T.C. 233. The Report of Commissioner to The Chief Judge of the Tax Court of the United States is printed in Appendix C hereto.

Jurisdiction.

The judgment of the Court of Appeals, printed in Appendix D hereto, was entered on November 28, 1967. A due and timely Petition for Rehearing was denied on January 18, 1968. By Order Extending Time to File Petition for Writ of Certiorari dated March 31, 1968, the time for filing a petition for writ of certiorari was extended to and including May 4, 1968. The jurisdiction of this Court is invoked under 26 U.S.C. 7482-(a) and 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the Court of Appeals failed to accord petitioners the correct standard of appellate review by the application of the "clearly erroneous rule" to the review of ultimate findings involving questions of law or mixed questions of fact and law and ultimate findings induced by a misapprehension of the correct principles of substantive law.

2. Whether the Tax Court erred in the application of the substantive rules of law of the State of California to determine whether petitioners transferred farm crops or cash proceeds to certain corporations.

3. Whether the Tax Court erred in considering as an issue whether farm crops had been transferred notwithstanding a statutory notice of deficiency and written stipulation stating that petitioners transferred farm crops to the corporations.

4. Whether the Tax Court erred in casting the burden of proof upon petitioners to establish that farm crops were transferred notwithstanding a notice of deficiency and written stipulation stating that petitioners transferred farm crops to the corporations.

5. Whether the Tax Court erred in its alternative determination which assumed that even if petitioners transferred farm crops to the corporations the income from their ultimate sale must be reported by petitioners on the legal theory that by the transfer of farm crops petitioners accomplished an anticipatory assignment of income already earned.

Statutes and Regulations Involved in the Case.

This case involves:

1. Section 1738 (1) and (2) of the Civil Code of the State of California (Statutes, 1931, ch. 1070, p. 2240, Section 1) which provides:

> Transfer of Property and Title
>
> § 1738. "PROPERTY IN SPECIFIC GOODS PASSES WHEN PARTIES SO INTEND. (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> "(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

2. Section 351(a) of the Internal Revenue Code of 1954 (26 U.S.C. 351 (a)) printed in Appendix E hereto.

3. Tax Court Rules of Practice, Rule 31 (b)(1); Rule 31 (b)(4); and Rule 31 (b)(6), each printed in Appendix F hereto.

Concise Statement of the Case.

The initial proceeding was before the Tax Court of the United States for redetermination of statutory deficiencies in income tax. Jurisdiction in the Tax Court is conferred by Section 7442 of the Internal Revenue Code of 1954, 26 U.S.C. 7442.

The Commissioner of Internal Revenue ("Commissioner" hereinafter) addressed a notice of deficiency to petitioners Adolph Weinberg and Etta Weinberg ("petitioners" hereinafter), asserting an income tax liability (deficiency) for the calendar year 1955 in the amount of $316,348.02 and for the calendar year 1956 in the amount of $105,149.08. The notice of deficiency is printed in Appendix G hereto.

In the notice of deficiency the Commissioner determined for each of those years that the taxable income of the petitioners should be increased, and the deficiency assessed, by including the cash proceeds realized from the sale of farm crops which farm crops the petitioners had transferred to some fourteen corporations in which they owned all the capital stock. The Commissioner offered alternative explanations for the

adjustments. The first alternative was that the fourteen corporations were not recognizable for Federal tax purposes and that the income (cash proceeds from the sale of farm crops) should be reported by the petitioners, who grew the crops and controlled the corporations. The second alternative explanation was if it were determined that the fourteen corporations were tax-worthy entities, that inasmuch as the petitioners "performed all the services and incurred all the expenses attributable to the matured crops which were transferred to the fourteen corporations, the sales proceeds should be imputed" to the petitioners, "in order to clearly reflect income."

Trial was before a Commissioner designated by the Tax Court, who heard the case and filed his report of Findings of Fact printed in Appendix C hereto.

The Tax Court determined that the cash sales proceeds from the sale of the farm crops were includable in the income of petitioners on the ground that petitioners did not transfer farm crops to the fourteen corporations but rather sold the farm crops and then transferred the cash proceeds to the fourteen corporations. In the alternative, the Tax Court determined that even if petitioners transferred the farm crops to the fourteen corporations the transfer amounted to a transfer of earned income on the theory that it constituted an anticipatory assignment of income.

The essential factual findings of the Tax Court upon which the primary and alternative decisions were pred-

icated are set forth in the Opinion of the Tax Court entitled, "Findings of Fact". They are:

"During the taxable years and at all times here material petitioner was engaged in farming in the Imperial Valley, County of Imperial, California. Most of his farming operations during 1955 and 1956 were conducted through a partnership composed of himself and his wife and known as the Adolph and Etta Weinberg Partnership."

"Farming in Imperial Valley, as elsewhere, generally is a hazardous occupation depending on the weather conditions, the adaptability of the soil to different types of crops planted thereon, the extent of insect infestation, and other factors."

"In February 1955 petitioner had a conference with his accountants and attorney for the purpose of reviewing and reorganizing his business affairs. His health was not of the best and on his doctor's advice he was contemplating a trip of several months to Europe. It was decided at the conference that petitioner would turn over some of his farming business to a number of corporations to be organized for that purpose. Petitioner instructed his attorney to form the proposed corporations and stated that he would go to Imperial Valley and analyze the remaining unharvested fields and would transfer certain growing crops and $1,000 in cash to each of the corporations in exchange for all of its capital stock. Accordingly, articles of incorporation for the proposed corporations were prepared by the attorney and were filed with the Secretary of State of Cali-

fornia. Thereafter applications for the issuance of stock were filed by the corporations with the Commissioner of Corporations of the State of California and all of their stock was issued to petitioner either in the latter part of 1955 or early in 1956 as shown below."

"In the latter part of February 1955 petitioner made a survey of the Imperial Valley farms and informed the Holtville partnership and Bedwell [the growers of the farm crops] that he was going to transfer his interest in certain of the growing crops on the farms to the several corporations and that these crops were to be harvested and sold for the corporations and not for his personal account. He designated field-by-field which crops were to be transferred to each corporation. Thereafter the crops designated for transfer to the several corporations were harvested and sold and the proceeds of the sales were deposited in bank accounts in the name of the corporations."

"All parties concerned treated the produce or proceeds from its sale as the property of the several corporations which petitioner had designated to receive them."

"The produce which was to be shipped by rail was loaded on cars as it was harvested and when each car was sold, a jacket was placed on it designating the corporation for whose account it was harvested and sold as the seller and showing the contents of the car, the purchaser, and the selling price. Certain expenses relating to shipping the produce, such as brokerage and car refrigeration,

were paid by the corporations. These expenses were recorded in the separate accounts of the corporations and claimed as deductions in their income tax returns."

"The books and records of the Holtville partnership [one of the growers] were kept by one of the three partners, E.N.D. Hatch, who handled the partnership's sales of produce. Hatch first learned that petitioner was organizing the corporations in a telephone conversation with petitioner's accountant in late February 1955. He was told that petitioner's interest in the crops from certain farm lands had been assigned to the several corporations and that he would be furnished a list of the crops belonging to each corporation. Petitioner gave similar notice to Holly [the purchaser of the sugar beets]."

"The assigned crops were given a cost basis of zero both by petitioner and the corporations. The books and records and returns of neither petitioner nor the corporations show any gain or loss on petitioner's assignment of produce to the corporations or his receipt of the corporations' stock."

The stipulated facts are included herein by this reference. The stipulated facts include:

"A permit authorizing the issuance of stock was duly issued by the California Commissioner of Corporations on [various dates] pursuant to application [of each of the fourteen corporations] therefor and the stock was duly issued to Adolph [Weinberg] on [various dates] in exchange for said $1,000 cash and farm crops."

It was further stipulated as a fact that the following minutes of the first meeting of the board of directors are typical for each of the corporations showing actions taken:

"Minutes of First Meeting of Board of Directors of [each corporation]

"The President next brought up for discussion issuing of stock of the Corporation and after discussion upon motion duly made, seconded and unanimously carried it was resolved as follows:

"WHEREAS, Adolph Weinberg is willing to transfer certain agricultural products to the corporation in exchange for stock; and

"WHEREAS, the officers and directors are fully familiar with certain produce and know the market values and are certain that the Corporation can realize the funds it needs for its farming operations from said produce, now, therefore,

BE IT RESOLVED that the agricultural produce hereinafter described plus $1,000 in cash be received in exchange for the 100 shares of the no par value common stock of this Corporation and that the proper officer execute the necessary application to the Commissioner of Corporations of the State of California."

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI.

I.

The Court of Appeals Failed to Accord Petitioners the Proper Standard of Appellate Review and Thus Perpetuated the Errors of the Tax Court.

There are special and important reasons for granting a review on writ of certiorari. The first is that the Court of Appeals has failed to accord these petitioners the proper standard of appellate review by limiting their review solely to a determination of whether the Tax Court decision was clearly erroneous. Thereby the Court of Appeals failed to perform its duty to determine whether the Tax Court correctly applied the correct rules of substantive law to its own findings of fact. Petitioners have thus been assessed a deficiency of over $420,000 and have yet to have a proper review of the legal questions presented to the Court of Appeals.

The ultimate conclusion of the Tax Court, that the petitioners transferred cash proceeds from the sale of farm crops as distinguished from farm crops, is what petitioners attack as erroneous. The error was induced when the Tax Court, after trial of the issues presented by the statutory notice of deficiency and written stipulations wherein it was stated that farm crops were transferred, determined to disregard the notice of deficiency and written stipulation and concluded that the petitioners failed to establish that farm crops were transferred and that the only transfer was of cash proceeds from the sale of farm crops. The first error of

the Tax Court is in its disregard, after trial, of the notice of deficiency and stipulation which established the transfer of farm crops and its conclusion that the petitioners failed to meet the burden of proof to establish farm crops were transferred. The error is then compounded when the Tax Court failed to apply the settled substantive California law to the evidentiary facts found. Finally, the Tax Court, perhaps apprehensive of the validity of its ultimate conclusion, determined alternatively, and erred in its alternative conclusion, that even if farm crops were transferred, the result was correct because the transfer constituted an anticipatory assignment of income.

The failure of the Court of Appeals to accord petitioners the proper standard of appellate review has perpetuated the errors of the Tax Court. Only by the granting of this petition for review will these petitioners be accorded any review of the errors of the Tax Court which have been perpetuated by the summary disposition by the Court of Appeals.

The Court of Appeals resolved to affirm the decisions of the Tax Court on the sole ground that the Tax Court was not clearly wrong in determining that the taxpayer failed to establish that farm crops were transferred. Explicit in the opinion of the Court of Appeals is the declaration that the scope of the appellate review was confined to the "clearly erroneous rule" applicable to appellate review of the factual findings of the Tax Court. Thereby the Court of Appeals

departed from the standard of review applicable to review of ultimate findings and the review of such findings induced by a misapplication of the law by the Tax Court. *Davis v. Parkhill-Goodloe,* 302 F. 2d 489 (5th Cir. 1962).

> "Here the most critical aspect of that standard of review is that findings induced by or resulting from a misapprehension of controlling substantive principles lose the insulation of F. R. Civ. P. 52 (a) and a judgment based thereon cannot stand."

And in *Plomb Tool Co. v. Sanger,* 193 F. 2d 260 (9th Cir. 1951):

> "Nor is Rule 52 (a) Federal Rules of Civil Procedure, 28 USCA applicable to appellant's contention that Sanger was an independent contractor, for it is not the findings of the district court that appellant assails, but rather its conclusion drawn therefrom."

When the Court of Appeals concluded the Tax Court was not clearly wrong, it essentially confined its inquiry to whether there was sufficient evidentiary support for the factual findings of the Tax Court. This inquiry requires the appellate court to accept the Tax Court's determination of credibility or resolution of evidentiary conflicts. Thus, while an appellate court might draw another conclusion, it should not for that reason alone strike down the conclusion of the Tax Court because it is not, under those circumstances, clearly wrong. But this inquiry is not a part of the appellate review to be accorded questions of law or mixed questions of fact and law. The only way in which an appellate court can determine whether the trial court correctly apprehended

and applied the proper substantive legal principles is by reviewing the result. Effective review cannot be impeded by application of the clearly erroneous standard to the review of ultimate findings.

> "uniformity within a circuit or among circuits can be achieved only if appellate review of the application of a legal standard is free of the shackles of the 'unless clearly erroneous' rule." *Mamiye Bros. v. Barber Steamship Lines, Inc.*, 360 F. 2d 774 (2d Cir. 1966).

Where the standard of review has been misapprehended or misapplied, this Court should intervene. *Universal Camera Corporation v. National L.R. Bd.*, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456.

A. The Tax Court Finding of the Ultimate Fact of Transfer of Cash Proceeds as Distinguished From Farm Crops Is Required to Be Reviewed Free From the Restraints of the "Clearly Erroneous Rule".

The Tax Court concluded that the petitioners did not transfer farm crops to the corporations but rather transferred cash. This was the ultimate finding as to the legal effect of the acts and utterances of the parties. This ultimate finding involving the application of legal principles is subject to review by this Court. *Baumgartner v. United States*, 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525.

Given the Tax Court's own findings of fact, where its conclusions were predicated upon an erroneous interpretation or application of the law of the State of California governing transfers of farm crops, this Court is reviewing a question of law as to whether the Tax Court applied the proper rule of law to the facts

found. *United States v. Singer Mfg. Co.*, 374 U.S. 174, 83 S. Ct. 1773, 10. L. Ed. 2d 823; *United States v. General Motors Corporation*, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321.

The Tax Court erred in the application of the correct substantive rules of law in two instances. The first occurred in connection with the Tax Court's misapprehension of the law of the State of California governing transfers of farm crops. The second occurred in connection with the alternative conclusion of the Tax Court that even if the petitioner transferred farm crops the transaction constituted an anticipatory assignment of income and that accordingly the cash proceeds realized upon sale of the crops by the corporations to third persons, should be included in petitioners' income. This latter conclusion violates the basic rule that ownership is the basic test for determining who shall pay the tax. *Pearce v. Comm'r*, 315 U.S. 543, 554, 62 S. Ct. 754; *Blair v. Comm'r*, 300 U.S. 5, 57 S. Ct. 330, 333.

B. Whether the Petitioners Transferred Crops or Cash Is an Ultimate Finding Involving Questions of Law or Mixed Questions of Law and Fact.

Petitioners do not attack the facts found by the Tax Court but only the ultimate conclusion reached that the acts and utterances did not result in a transfer of farm crops but in a transfer of cash proceeds. Thus, as in *Simon v. Comm'r*, 285 F. 2d 422 (3d Cir. 1960):

> "In this court the petitioner does not assail the facts, largely stipulated, as found by the Tax Court,

but only its ultimate finding that a sale took place, asserting that 'there are no facts to support the Court's conclusion that a "sale", or any other kind of taxable disposition, took place.' The Tax Court's conclusion that the mortgage and subsequent conveyance to Exco was a sale is, of course, an ultimate finding of fact which this court can review free of the restraint imposed by the clearly erroneous rule applicable to ordinary findings of fact."

Also, in *Anderson v. Comm'r,* 78 F. 2d 636 (9th Cir. 1935), the ultimate question was whether the husband or wife was the owner of income-producing property. The question of ownership involved the effect, as measured by California law, of certain transactions between husband and wife. The court stated:

"Ownership is an ultimate fact, and the question here is ownership."

In *Brown v. Cowden Livestock,* 187 F. 2d 1015 (9th Cir. 1951), the court was concerned with the legal effect of certain transactions involving cattle and as to whether a sale resulted. There the court states:

"The findings of the District Judge in this regard are in effect findings as to the effect of these transactions rather than findings which involve disputed facts. Hence we do not find ourselves obstructed by the traditional rule not to disturb findings of fact of the trial court. We are therefore free to make our own determination as to the legal conclusion to be drawn."

The findings dealing with the effect of certain transactions or events is reviewable as a finding of law. *Stevenot v. Norberg,* 210 F. 2d 615 (9th Cir. 1954).

Where the facts involved in connection with the transaction are not in dispute, the question of when title passes becomes a question of law. *Lewis v. Farmers Grain & Milling Co.,* 52 Cal. App. 211, 198 Pac. 426 (1921).

> ". . . if as in this case the facts are not in dispute, it is a question of law for the court."

Thus, when the Tax Court found that petitioners, their business associates, the corporations which sold the crops to third persons, and the third persons who purchased the crops, all treated the crops and proceeds as belonging to the corporations, but notwithstanding this finding concluded that cash, not crops, was transferred, the appellate review must concern itself with the soundness of the legal conclusion that these actions operated to legally pass title in accordance with the laws of the State of California.

This ultimate conclusion requires no re-examination of the evidentiary facts, nor does it require an evaluation of the evidence in light of the fact finding tribunal's experience with the mainsprings of human conduct. The trial judge's experience with human affairs lead him to the factual conclusion that all parties involved in the transaction considered the crops and proceeds the property of the corporations. Upon the establishment of this fact, and the other facts as found, the question is presented as to the legal effect of these facts.

II.

The Law of the State of California Compels the Ultimate Finding That Farm Crops Were Transferred.

The transactions involving the crops took place in the State of California and therefore the determination as to the effect of the transactions, that is, whether they resulted in a transfer of farm crops or cash proceeds from their sale, is governed by the law of that State. *Pacific Grape Products Co. v. Comm'r*, 219 F. 2d 862 (9th Cir. 1955).

The substantive rules of law in California that measure the legal effect of the acts of the parties are:

Growing crops are proper subjects of absolute sale. In *Jones v. California Growers & Shippers*, 182 Cal. 777, 190 Pac. 172 (1920), the rule is:

> "Growing crops as well as other personal property are subject to absolute sale."

Thus, as stated in *Carey v. Glenco Citrus Products Co.*, 45 Cal. Rptr. 365, 235 Cal. App. 2d 727 (1965):

> "Under such a sale, title to the crop is transferred to the buyer at such time as the parties to the contract intend it to be transferred (Civil Code, § 1738), even though the crop is growing and has not matured."

Title to property passes in accordance with the intention of the parties. *Post v. Jacobsen*, 4 Cal. Rptr. 817, 180 Cal.App. 2d 297 (1960); *Nead v. Specimen Hill Mining Co.*, 52 Cal. App. 2d 475, 126 P. 2d

450 (1942). This rule is incorporated into California statutory law. California Civil Code, Section 1738, subdivision (1):

> "(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

The facts found by the Tax Court include the finding that "He [Weinberg] designated field-by-field the crops which were to be transferred to each corporation."

The Tax Court also found that all parties concerned, petitioners, the corporations, the growers and the third persons to whom the crops were sold for cash, treated the crops and proceeds as the "property of the several corporations which petitioner had designated to receive them."

Also, "The produce which was to be shipped by rail was loaded on cars as it was harvested and when each car was sold, a jacket was placed on it designating the corporation for whose account it was harvested and sold as the seller and showing the contents of the car, the purchaser, and the selling price."

The Tax Court also states in its opinion that petitioners' intention was to transfer farm crops to the corporations.

Notwithstanding the detailed findings of fact, the Tax Court concluded that crops were not transferred to the corporations because "The only tangible evidence of any actual transfers to the corporations are the bills

of sale made out by petitioners to the corporations allegedly in part consideration for their stock." Later in the opinion the Tax Court reiterated by stating, "As stated above, the only tangible evidence of any transfers to the corporations are the bills of sale."

The Tax Court then reasoned that inasmuch as the bills of sale were actually prepared after harvest and sale of the crops they were of no significance and that the only transfers that occurred were transfers of cash proceeds and "These transfers occurred independently of the bills of sale, when, under petitioners direction, the proceeds from the sales were deposited in the corporations' bank accounts."

Petitioners agree that the execution of the bills of sale were not operative to transfer anything. They merely memorialized an event which had transpired.

The Tax Court obviously felt itself precluded from concluding that the crops were transferred because no "tangible evidence" such as a bill of sale was prepared and executed prior to harvest. But the law of California does not require the "tangible evidence" that the Tax Court required.

A tangible written bill of sale is not required to pass title. In *Lund v. Ganahl,* 22 Cal. App. 103, 133 Pac. 501 (1913), the rule is:

> "It is true that the price was not fully paid, and that no bill of sale passed between the parties . . . and it is well settled that it is not essential to the transfer of an interest in personal property that

> either of those two things should have been done; and when, as here, no different intention is manifested, the presumption is that title does pass without payment of the price or delivery of a bill of sale."

Nor does the law of California require such "tangible evidence" as delivery or payment. In *Hamilton v. Klinke,* 42 Cal. App. 426, 183 Pac. 675 (1919), the court states:

> "As between the parties a sale may be completed without either delivery or payment of consideration. That a sale may be consummated without delivery was decided in Johnson v. Dixon Farms Co., 29 C.A. 52, 155 P. 134."

The Tax Court concluded that the only transfer occurred when the cash proceeds were deposited in the corporations' bank accounts. The Tax Court equated the deposit to delivery and thus saw "tangible evidence" of a transfer and then reasoned that, inasmuch as there was no bill of sale executed prior to harvest, nor was there a physical delivery of the crops, the *only* tangible evidence of *any* transfer was that of the deposit of cash proceeds, thereby compelling the conclusion of ultimate fact that cash, not crops, was transferred. The Tax Court labored under the misapprehension that growing farm crops (or other personal property such as cash) cannot be transferred in California unless that transfer is evidenced by tangible evidence such as a bill of sale executed prior to transfer or manual delivery of the crops or cash.

The Tax Court did not use the words "tangible evidence" of transfer to mean "credible evidence" of transfer, nor did it equate "tangible evidence of any transfers" with an objective manifestation of transfer. The Tax Court on two occasions stated the "*only* tangible evidence" (emphasis ours) consisted of a document, a bill of sale. In so limiting "tangible evidence" to a document, the Tax Court could not have considered the objective manifestations of the parties as meeting the requirement of "tangible evidence." Thus, while the Tax Court found that:

> (1) petitioners designated field by field the crops which were to be transferred;
>
> (2) all parties treated the produce or the proceeds from sale as the property of the corporations; or
>
> (3) petitioner notified the growers and the buyers that he had assigned the crops to the corporations; and
>
> (4) as the produce was harvested, a jacket was placed on it designating the corporation for whose account it was harvested and sold; and
>
> (5) the expenses of selling the crops were paid by the corporations;

it concluded that none of these actions constituted any tangible evidence of a transfer of farm crops.

The Tax Court did not, in stating that the "only tangible evidence of transfer was the bill of sale, mean that the only objective manifestation of a transfer of crops was a bill of sale. There were ample objective manifestations of the intent of the parties which the Tax Court found. But these were not the "tangible evi-

dence" which the Tax Court required. Thus, the Tax Court equated tangible evidence to a physical bill of sale or delivery by deposit. The Tax Court excluded from its concept of "any tangible evidence" of transfer the objective manifestations of the parties as set forth in the detailed findings. Tangible evidence in the form of a physical bill of sale or delivery is not required by the law of the State of California.

In reviewing the rules of the common law regarding the passage of title, this Court, in *Hatch v. Standard Oil Company of Cleveland,* 100 U.S. 554, 25 L. Ed. 124, notes that "tangible evidence" of a transfer such as a writing, delivery or payment is not required, nor is it necessary that the property be in finished condition ready for delivery. The important factor is the indicated understanding of the parties.

In *Gensinger v. Comm'r,* 208 F. 2d 576 (9th Cir. 1953), the issue was whether a corporation had "distributed" crops to the sole shareholder. The court states:

> ". . . We turn, then, to the critical question whether the taxpayer 'distributed' the apricot and peach crops to himself as a shareholder. The fruit was personal property and no writing was necessary to transfer title to it. . . . In similar circumstances it has been held that any words or acts manifesting the person's intention to presently take title to the property in his individual capacity, or indicating that he considered the property his own is sufficient to establish that the transfer was made. In re Grant D.C.N.Y. 198 Fed. 708, 709, 710 affirmed without discussion of this point, Grant v. United States, 227 U.S. 74, 33 S.Ct. 190, 57 L.Ed. 423. "

III.

The Tax Court Erred in Concluding That Farm Crops Had Not Been Transferred When the Notice of Deficiency and a Stipulation Established That Farm Crops Were Transferred.

In the Commissioner's notice of deficiency (printed in Appendix G), addressed to petitioners, page 2, paragraph (a) 1 (b), under Explanation of Adjustment, the Commissioner stated that an adjustment was required by reason of the "matured farm crops which were transferred to the fourteen corporations." Nowhere in the notice did the Commissioner state or suggest that cash proceeds were transferred to the fourteen corporations.

Thereafter, in commencing preparation for trial of the issues, petitioners and the Commissioner entered into an extensive written stipulation as required by Rule 31 (b)(1) of the Tax Court Rules of Practice. The stipulation stated in part, "A permit authorizing the issuance of stock was duly issued by the California Commissioner of Corporations . . . pursuant to the application of [each corporation] therefor and the stock was duly issued to Adolph . . . in exchange for said $1,000 cash and farm crops." Such a stipulation is binding. *Weaver v. Comm'r,* 58 F. 2d 755 (9th Cir. 1932). Objections to a stipulation are required to be made in the stipulation or at the trial. [Tax Court Rules of Practice, Rule 31 (b)(4) and Rule 31 (b)(6).] No objection was made until after the trial when the Commissioner in his brief asked the Tax Court to disregard the stipulation. The Tax Court acceded, disregarded the stipulation and the notice of deficiency, and thereupon considered as an issue the question of whether farm crops or cash proceeds were transferred by petitioners to the corporations.

The basic error of the Tax Court was in considering an issue not raised in the Commissioner's notice of deficiency and which matter had been resolved by the stipulation. *Aubrey S. Nash,* 31 T.C. 569 (1958); *Vincent C. Campbell,* 11 T.C. 510 (1948).

The Tax Court should have addressed itself to the issues raised and tried, that is, whether the corporations were tax-worthy entities and whether the transfer of crops was an anticipatory assignment of income.

Trial was then had on the issues raised in the notice of deficiency. The Commissioner assigned by the Tax Court concluded the trial and filed his report. [Appendix F]

As was stated in *General Utilities & Operating Co. v. Helvering,* 296 U.S. 200, 56 S. Ct. 185:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

The Tax Court disregarded the stipulation and the notice of deficiency in determining that farm crops were not transferred. The Tax Court explained its disregard of the stipulation by stating the stipulation, even if construed literally, was erroneous and that the stipulation only "nominally" means that stock was issued for crops.

A literal construction of the stipulation requires no argument. The construction of written documents pre-

sents a question of law for review as to their meaning. *Cordovan Associates, Incorporated v. Dayton Rubber Company,* 290 F. 2d 858 (6th Cir. 1961); *Norfolk Nat'l Bank of C & T v. Comm'r,* 66 F. 2d 48 (4th Cir. 1933).

By the action of the Tax Court to disregard the notice of deficiency and the stipulation, petitioners have been effectively deprived of the opportunity to engage in trial of the issues and claims raised or determined thereby. Neither the "nominal" interpretation of the stipulation nor the resolution of the issue against petitioner by the Tax Court resolves the basic question of whether the petitioners were afforded a fair trial on the stated claims against them as defined in the notice of deficiency and stipulation.

It is this basic error which has deprived petitioners of a fair trial involving those issues which were raised in the notice of deficiency and the pleadings. Not only does such a basic error prejudice petitioners by injecting an issue for determination of which petitioners at or prior to trial were not advised, but it has, in this case particularly, wrongfully imposed the burden of proof on the issue. It is established that petitioners have the burden of disproving the correctness of the notice of deficency. The Tax Court concluded that, inasmuch as the "only tangible evidence of transfer" was certain bills of sale, petitioners had failed to establish that there was a transfer of farm crops. The Court of Appeals similarly concluded that petitioners

failed to establish a transfer of farm crops. The conclusion of the Tax Court, as well as that of the Court of Appeals, is predicated upon the duty of petitioners to establish the transfer of crops by a preponderance of the evidence. However, where the Commissioner departs from the grounds relied on in the notice of deficiency, he then has the burden of proof as to the issue. In *Thomas Wilson,* 25 T.C. 1058 (1956) the Tax Court states:

> "While a statutory notice of deficiency is presumed correct, and a petitioner has the burden of disproving its correctness, when the Commissioner departs from the grounds relied on in his deficiency notice to sustain a new theory later raised, he has the burden of proving any new matter raised. Sheldon Tauber, 24 T.C. 179."

The Tax Court, after trial, and the Court of Appeals cast upon petitioners the duty to establish the transfer of farm crops to the corporations. Prior to trial the Commissioner in the notice of deficiency had expressly recognized the transfer of farm crops but asserted the deficiency on the basis that the transferee corporations were not tax-worthy entities or, in the alternative, that the transfer constituted an anticipatory assignment of income. After the trial the Commissioner, in frank recognition of his previously stated position, requested the Tax Court to disregard the stipulation, thus admitting a clear departure from his previous position that farm crops were transferred. The burden of proof which petitioners assumed at the trial

was to disprove the correctness of the notice of deficiency. The Court of Appeals in affirming the determination of the Tax Court did so on the sole basis that the Tax Court was not clearly wrong in determining that petitioners failed to establish that farm crops were transferred. The duty to establish the transfer of farm crops was imposed after the trial. The Tax Court and the Court of Appeals thus mistakenly imposed the burden of proof upon petitioners.

In the case of *Fulton National Bank,* 363 F. 2d 562 (5th Cir. 1966):

> "If the trier of facts labored under such a serious legal misapprehension as to which party bore the burden of proof, its ultimate fact findings are not clothed with the insulation of Rule 52 (a) and may be disregarded by the appellate court."

The effect of the error of the Tax Court is a decision that petitioners failed to establish at the trial the very thing, transfer of farm crops, that was established by the notice of deficiency and the stipulation. This finding of the Tax Court, so induced, is free from the restraints of the "clearly erroneous rule" and should have been so reviewed by the Court of Appeals. It was not. The appellate review followed the same error, the opinion of the court stating the Tax Court decision was affirmed solely on the ground that the petitioners failed to establish the transfer of farm crops.

IV.

The Tax Court Erred in Its Alternative Decision That, Assuming That Farm Crops Were Transferred, the Petitioners Transferred Income Already Earned by Describing the Transaction as an Anticipatory Assignment of Income.

This argument is addressed to the Tax Court's alternative determination that, accepting the ultimate fact of transfer of farm crops to the corporations, the transfer was a transfer of "earned income," taxable to petitioners, by labeling the transfer of the farm crops as an anticipatory assignment of income.

Petitioners transferred farm crops to the several corporations during the calendar year 1955 in a transaction pursuant to and precisely within the terms of Section 351 of the Internal Revenue Code of 1954, which by the terms of that section resulted in the nonrecognition of gain or loss to petitioners. Further, during the calendar year 1956, petitioners contributed farm crops to several of the corporations as a contribution to capital, likewise, a transaction which resulted in the nonrecognition of gain or loss to petitioners.

Section 351(a) of the Internal Revenue Code of 1954, provides in part:

> ". . . No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control . . . of the corporation . . ."

Section 351 of the Internal Revenue Code of 1954, dates from the Revenue Act of 1921. Under previous

revenue acts, the creation of even a one-man corporation by the transfer of appreciated or depreciated property for its entire capital stock was an occasion on which gain or loss was recognized by the transferor. Since 1921, however, gain or loss has not been recognized on such a transaction. The basic premise of Section 351 is that a transfer of appreciated or depreciated property to a corporation that is controlled by the transferor works a change of form only, which should not be an occasion for reckoning up the transferor's gain or loss on the transferred property. See *Portland Oil Co. v. Comm'r,* 109 F. 2d 479, 488 (1st Cir. 1940), *cert. den.* 310 U.S. 650, 60 S. Ct. 1100. A capital contribution by a sole stockholder to the corporation represents a transfer for full and adequate consideration, *Heringer v. Comm'r,* 235 F. 2d 149 (9th Cir. 1956), and represents an additional price paid for the shares of stock held by the individual shareholder. Treas. Reg. (1954 Code) ¶ 1.118-1.

Since the transfers of the farm crops by petitioners were pursuant to transactions under which neither gain nor loss was recognized by petitioners, upon the subsequent sale of the farm crops by the transferee corporations, the income therefrom was taxable to the transferee corporations and not to petitioners.

The Tax Court, however, determined that since practically all of the services contributing to the production of the income from the sale of the farm crops were performed by petitioners such income was all earned by petitioners and therefore the transfers of the farm crops were of income already earned.

This determination of the Tax Court is erroneous in law. Where income is derived from property, the basic

test for determining who is to bear the tax is that of ownership. *Pearce v. Comm'r* (1942), 315 U.S. 543, 554, 62 S. Ct. 754, 760; *Blair v. Comm'r* (1937), 300 U.S. 5, 12, 57 S. Ct. 330, 333.

Pearce v. Comm'r, involved an annuity contract purchased by the divorced husband for the divorced wife pursuant to their agreement made prior to the divorce. The question presented was whether the income arising from the annuity subsequent to the divorce decree was taxable to the wife who received it or to the husband who provided it. In holding that the income was taxable to the wife, the Supreme Court said (315 U.S. at p. 554):

> ". . . Such cases as Helvering v. Horst, 311 U.S. 112, . . . Helvering v. Eubank, 311 U.S. 122, . . . and Harrison v. Schaffner, supra, are not opposed to this result. Those cases dealt with situations where the taxpayer had made assignments of income from property. He was held taxable on the income assigned by reason of the principle 'that the power to dispose of income is the equivalent of ownership of it and that the exercise of the power to procure its payment to another, whether to pay a debt or to make a gift, is within the reach' of the federal income tax law. Harrison v. Schaffner, supra, 312 U.S. 580, . . . But in those cases the donor or grantor had 'parted with no substantial interest in property other than the specified payments of income' . . . Here he had parted with the corpus. And 'the tax is upon income as to which' in the general application of the revenue acts, the tax liability attaches to ownership.' Blair v. Comm'r, 300 U.S. 5, 12, 57 S. Ct. 330, 333, 81 L. Ed. 465. . . ."

As in the *Pearce* case and the *Blair* case, the tax here is not upon earnings which are taxed to the one who earns them. In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership, that is, to the several corporations who owned and then sold the farm crops. To the time that petitioners transferred the farm crops, no income had been received by or accrued to them with respect to the farm crops. At most, the farm crops represented property being held by petitioners for future disposition or utilization.

A transfer of farm crops, either harvested or unharvested, pursuant to a transaction under which the Internal Revenue Code provides for nonrecognition of gain or loss does not constitute a transfer of "income already earned", but rather merely constitutes a transfer of property which has appreciated in value and upon the subsequent sale of the farm crops by the transferee the income from the sale will not be taxed to the transferor, but rather the income will be taxed to the transferee. This is so because farm crops, either harvested or unharvested, merely represent property being held for future disposition or utilization and do not represent taxable income either earned, realized, received, or accrued.[1] *Comm'r v. South Lake Farms, Inc.*, 324 F. 2d 837 (9th Cir. 1963); *United States v. Horschel*,

[1]The Tax Court has so held on more than one occasion. *Ralph Romine*, 25 T.C. 859 at 876 (1956), transfer of harvested corn; *Elsie Sorelle*, 22 T.C. 459 (1954), transfer of mature crops of wheat immediately prior to harvest; *Catharine G. Shatzer*, 3 T.C. 914 (1944), transfer of farm chattels; *Estate of Tom L. Burnet*, 2 T.C. 89 (1943); *Louisiana Irrigation & Mill Co.*, 14 T.C.M. 1252, T.C. Memo. 1955-320, transfer of harvested rice; *cf. Stuart A. Rodgers*, 38 T.C. 785 (1962), transfer of timber.

205 F. 2d 646 (9th Cir. 1953); *White v. Brodrick,* 104 F. Supp. 213 (D.C.D., 1952) appeal dismissed 198 F. 2d 751; *cf. Campbell v. Prothro,* 209 F. 2d 331 (5th Cir. 1954) and *Gensinger v. Comm'r,* 208 F. 2d 576 (9th Cir. 1953).

The Court in *Comm'r v. South Lake Farms, Inc., supra,* held that a transfer of growing crops by one corporation to another in a nontaxable liquidation did not result in any gain to the transferor. At the time of the liquidation of the transferor on October 3, the cotton crop had not completely matured and harvesting by the transferee of the cotton crop commenced on October 4, and the Court said (324 F. 2d at p. 838):

> ". . . Under the published rulings of the Commissioner, not all of the events which fix the right to receive the income from the crops had occurred by the time of liquidation. (See Treas. Reg. (1954 Code) ¶ 1.446-1 (c) (1) (ii)) . . .
>
> ". . . None of the cases on which the Commissioner relies is in point. In most of them the liquidation of a corporation which was on a cash basis occurred at a time when income was fully earned, and the Commissioner, in order truly to reflect income, required that the corporation accrue these items in the year of dissolution . . ."

and at page 839:

> ". . . Here, on the other hand, no income had been earned at the time of the dissolution, and the growing cotton crops, which were harvested thereafter over a period of two and a half months, cannot fairly be said to represent accrued or accruable income . . ."

Likewise, in the instant case, no income had been earned at the time of the transfers by petitioners.

In *United States v. Horschel,*[2] *supra,* a corporation which kept its books and reported its income on a calendar year and on a cash basis, dissolved and conveyed, among other things, to the stockholders, apples in a warehouse "pool" and certain supplies with a tax basis of zero which the stockholders sold and received the proceeds therefrom, and the Court squarely held that the transfer of the apples to the transferees was not an anticipatory assignment of income taxable to the transferor, saying (205 F. 2d at p. 647):

> "The sole question presented on this appeal is whether part of the distribution of assets made by a corporation upon its liquidation constituted an assignment of anticipated income taxable to it . . ."

Practically all of the services contributing to the production of the income were performed by the corporation. The Ninth Circuit Court of Appeals in holding that the proceeds from the sales of the foregoing apples and supplies were not taxable to the corporation stated that the principle of anticipatory assignment of income was not applicable and so stated (205 F. 2d at p. 648):

> ". . . The supplies were disposed of for cash more than four months after the corporation was out

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[2]In *Hersloff, et al. v. U.S.*, 310 F. 2d 947 (Ct. Cl.-1962), the Court noted: "The [Horschel case] turned on the Government's attempt to tax certain income to the [corporation] on the ground that the prior distribution of the assets had amounted to an anticipatory assignment of income already earned by the [corporation]." The *Horschel* case was also noted in *Wellhouse, Jr.,*

(This footnote is continued on the next page)

> of existence. The apples had been packed and placed in a warehouse pool and were sold for cash from time to time during the eleven months following dissolution. These apples could no more be considered cash at the time of dissolution than could be the ranch which produced them . . ."

And at page 649:

> ". . . The principle of anticipatory assignment of income is not applicable in this case . . .
>
> ". . . and the income was properly reported by the owners of the property that earned it, viz. the distributee shareholders. See Blair v. Commissioner, 1937, 300 U.S. 5, 57 S.Ct. 330, 81 L. Ed. 465 . . ."

The same result was reached in *Gensinger v. Comm'r*, 208 F. 2d 576 (9th Cir. 1953), where a corporation liquidated and distributed to its shareholder apricots and peaches, which crops were sold by the shareholder. Practically all of the services contributing to the production of income were performed by the corporation and the principal question before the Ninth Circuit Court of Appeals was whether the proceeds of the sales of the apricots and peaches were income of the transferor corporation, and the Court held, no.

In *White v. Brodrick, supra*, during the taxable year 1947, the taxpayer donated bushels of wheat to a charitable organization in a nontaxable transaction

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et al. v. Tomlinson, 197 F. Supp. 739 (D.C. So. Dist. Fla.-1961), as an example of the rule that if income producing property is assigned, the income therefrom is not taxable to the assignor.

and deducted on his 1947 income tax return as a charitable contribution the fair market value of the wheat. The wheat donated by the taxpayer was planted in 1946, was harvested and stored in 1947, and was thereafter held by the taxpayer for sale in the ordinary course of his farming business. Practically all of the services contributing to the production of income were performed by the taxpayer. The Commissioner determined that the gross income of the taxpayer should be increased by an amount representing the fair market value of the wheat donated. The Court concluded that the taxpayer did not realize taxable income or gain by reason of the donation and disposition of the wheat and that the Commissioner erred in holding that the fair market value of the wheat donated and disposed of was taxable income to the taxpayer.

Conclusion.

Petitioners respectfully submit that this Court, by application of the substantive law of the State of California to the factual findings of the Tax Court, should determine that the Tax Court erred in its determination of the ultimate fact and that, by application of the substantive law of California, petitioners transferred farm crops to the corporations rather than cash proceeds from their ultimate sale. Further, that this Court should determine that the Tax Court erred in its alternative decision that the transfer of farm crops constituted a transfer of income already earned and that the proceeds from the sale of the crops by the

corporations is properly reportable by the corporations because they were the owners of the crops at the time of sale. The Tax Court did not make findings of fact or draw conclusions of law on the issue of whether the corporations were tax-worthy entities or whether the several corporations were entitled to a single surtax exemption.

Respectfully submitted,

DEMETRIOU & DEL GUERCIO,
RICHARD A. DEL GUERCIO,
RONALD J. DEL GUERCIO,
Attorneys for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Commissioner of Internal Revenue, Petitioner, vs. Sugar Daddy, Inc., et al., Respondents.

Adolph Weinberg, et al., Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Sugar Daddy, Inc., et al., Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 21,213.

[November 28, 1967]

Petition to Review a Decision of the Tax Court of the United States.

Before: BROWNING and ELY, Circuit Judges, and FOLEY, District Judge.

PER CURIAM:

Taxpayers seek review of the decisions entered pursuant to the opinion of the Tax Court reported at 44 T.C. 233 (1965). The government concedes that the Tax Court erred in including income of E T Farming Company in the taxpayers' income. In all other respects we affirm the Tax Court's decisions, on the ground that the Tax Court was not clearly wrong in determining that the taxpayers failed to establish that they had transferred growing, unharvested crops to the taxpayers' twelve corporations rather than transferring to the corporations proceeds from the sale of those crops.

Remanded for recomputation under Rule 50 in accordance with this opinion.

APPENDIX B.

44 T. C. No. 26

Tax Court of the United States

Adolph Weinberg and Etta Weinberg, Sugar Daddy, Inc., et al.[1] Petitioners, v. Commissioner of Internal Revenue, Respondent. Docket Nos. 93361, 93353, 93354, 93362-93371.

Filed May 28, 1965.

Petitioner's Purported Assignment of Growing Crops to His Several Newly Formed Corporations Held, in Fact, Assignments of the Proceeds From the Sale of Such Crops and the Income From Such Sales Held Taxable to Petitioner.

Ronald J. Del Guercio and *Richard A. Del Guercio,* for the petitioners.

Marion Malone, for the respondent.

WITHEY, *Judge:* These proceedings involve income tax deficiencies and additions to tax under section 6651(a) of the Internal Revenue Code of 1954 as follows:

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[1]Proceedings of the following petitioners are consolidated herewith: Vegetable Farming Co., Docket No. 93354; A. W. Farms Co., Docket No. 93362; Best Lettuce Co., Docket No. 93363; Brookside Farms, Inc., Docket No. 93364; Chief Farms, Inc., Docket No. 93365; Girard Farming Co., Docket No. 93366; Imperial Lettuce Farms, Inc., Docket No. 93367; Lettuce Farming Co., Docket No. 93368; Lion Farms, Inc., Docket No. 93369; Parsons Farms, Inc., Docket No. 93370; and Shannon Farms, Inc., Docket No. 93371.

Petitioner	Taxable year	Deficiency	Addition to tax sec. 6651(a)
Weinberg, Adolph, et ux.	1955	$316,348.02	—
Docket No. 93361	1956	105,149.08	—
Sugar Daddy, Inc.	4/22 - 7/31/55	5,041.67	—
Docket No. 93353	Ended 7/31/56	3,880.61	—
	Ended 7/31/57	None	—
Vegetable Farming Co.	3/4 - 3/31/55	944.61	$ 413.42
Docket No. 93354	Ended 3/31/56	3,569.95	—
A. W. Farms Co.	3/9 - 6/30/55	3,539.63	626.55
Docket No. 93362	Ended 6/30/56	4,503.23	—
	Ended 6/30/57	None	—
Best Lettuce Co.	3/4 - 3/31/55	4,319.58	1,405.66
Docket No. 93363	Ended 3/31/56	1,020.30	—
	Ended 3/31/57	696.39	—
Brookside Farms, Inc.	4/22 - 6/30/55	45.93	432.41
Docket No. 93364	Ended 6/30/56	1,523.87	—
	Ended 6/30/57	2,909.36	—
Chief Farms, Inc.	4/22 - 8/31/55	2,529.81	—
Docket No. 93365	Ended 8/31/56	240.41	—
Girard Farming Co.	Ended 4/30/57	2,013.72	—
Docket No. 93366			
Imperial Lettuce Farms, Inc.	3/4 - 3/31/55	4,518.82	1,577.10
Docket No. 93367	Ended 3/31/56	None	—
	Ended 3/31/57	2,890.90	—
Lettuce Farming Co.	3/4 - 3/31/55	4,678.46	3,296.78
Docket No. 93368	Ended 3/31/57	4,114.00	—
Lion Farms, Inc.	4/22 - 8/31/55	None	—
Docket No. 93369	Ended 8/31/56	4,324.91	—
Parsons Farms, Inc.	4/22 - 6/30/55	None	432.41
Docket No. 93370	Ended 6/30/56	2,693.39	—
Shannon Farms, Inc.	5/11 - 6/30/55	2,127.75	414.25
Docket No. 93371	Ended 6/30/56	4,362.09	—

The deficiencies result from respondent's determination that the several corporate petitioners are not recognizable tax entities and that the income from the sale of the crops which the individual petitioners allegedly assigned to them is taxable to the individual petitioners.

FINDINGS OF FACT

Petitioners Adolph and Etta Weinberg are husband and wife, residing at Norwalk, California. They filed joint returns for the calendar years 1955 and 1956. The term "petitioner," as hereinafter used, will refer to Adolph Weinberg unless otherwise indicated. The other petitioners are California corporations with their principal offices located at the same business address as petitioner, 12948 South Pioneer Boulevard, Norwalk, California. All of the petitioners filed their returns with the director of internal revenue at Los Angeles. Their returns were made, and their books and records kept, on a cash receipts and disbursements method of accounting. The returns filed by petitioner and his wife were made on a calendar year basis and those for the corporate taxpayers were for fiscal years corresponding to their various accounting periods.

During the taxable years and at all times here material petitioner was engaged in farming in the Imperial Valley, County of Imperial, California. Most of his farming operations during 1955 and 1956 were conducted through a partnership composed of himself and his wife and known as the "Adolph and Etta Weinberg partnership." This partnership will be referred to hereinafter as "the Weinberg partnership."

Imperial Valley is a highly productive farming and citrus-growing area located about 200 miles south of

Norwalk, California, and extending approximately 70 miles north and south and 30 miles east and west.

Petitioner has been engaged in farming and related business in that area for a number of years. He is president of Coast Grain Company, a corporation engaged in the dairy and cattlefeed business at Norwalk, and devotes most of his time to that business. Coast Grain Company made loans in large amounts to its customers for financing their farm and livestock operations.

In his farming operations petitioner purchases or leases a tract of land and engages a farmer, either an individual, corporation, or partnership, to grow the crops, usually on a share-crop or profit-sharing basis.

In 1952 petitioner entered into a farming venture with another partnership, Holtville Vegetable Company. This partnership, hereinafter referred to as "the Holtville partnership," was composed of three partners, unrelated to petitioner. Under the terms of the Holtville venture, petitioner was to finance certain farm operations and the partnership was to manage the farms and do all of the farm work. The profits were to be divided 47½ percent to petitioner and 52½ percent to the partnership. About 1,100 acres of farmlands, known as the "Coppinger properties," consisting of a number of different tracts of land, were involved. The land was then under lease to the Holtville partnership, which subleased it to petitioner. The Holtville venture agreement expired at the end of the 1955 crop year.

In 1952 petitioner leased other farmlands which he placed under the management of another grower, James Bedwell, on a salary basis.

The principal crops grown on the farms in which petitioner had an interest were cotton, sugarbeets, alfalfa, flax, barley, lettuce, and carrots. For cotton, the land is prepared and seeded in January and February and the crops harvested in the same months of the following year. For the other crops, except alfalfa, the seeding is done in July, August, and September and the harvesting in the spring and early summer of the following year. Alfalfa is usually a 3-year crop with several annual cuttings over the period from January to September.

Farming in Imperial Valley, as elsewhere, generally is a hazardous occupation depending on weather conditions, the adaptability of the soil to different types of crops planted thereon, the extent of insect infestation, and other factors. In the first 2 years of its existence, 1952 and 1953, the Holtville farming venture sustained operating losses, petitioner's share of which amounted to approximately $100,000.

In February 1955, petitioner had a conference with his accountants and attorney for the purpose of reviewing and reorganizing his business affairs. His health was not of the best and, on his doctor's advice, he was contemplating a trip of several months to Europe. It was decided at the conference that petitioner would turn over some of his farming business to a number of corporations to be organized for that purpose. Petitioner instructed his attorney to form the proposed corporations and stated that he would go to Imperial Valley and analyze the remaining unharvested fields and would transfer certain growing crops and $1,000 in cash to each of the corporations in exchange for all of its capital stock. Accordingly, articles of incorporation for

the proposed corporations were prepared by the attorney and were filed with the Secretary of State of California. Thereafter, applications for the issuance of stock were filed by the corporations with the Commissioner of Corporations of the State of California, and all of their stock was issued to petitioner either in the latter part of 1955 or early in 1956 as shown below. The following table shows the dates on which the articles of incorporation for each corporation were filed and the dates on which the stock was issued:

Corporation	Articles of incorporation filed	Stock issued
Best Lettuce Co.	Mar. 4, 1955	Oct. 30, 1955
Vegetable Farming Co.	Mar. 4, 1955	Oct. 24, 1955
Imperial Lettuce Farms, Inc.	Mar. 4, 1955	Nov. 15, 1955
Lettuce Farming Co.	Mar. 4, 1955	Nov. 15, 1955
A. W. Farms Co.	Mar. 9, 1955	Nov. 15, 1955
E T Farming Co.	Mar. 9, 1955	Dec. 22, 1955
Chief Farms, Inc.	Apr. 22, 1955	Oct. 30, 1955
Parsons Farms, Inc.	Apr. 22, 1955	Nov. 16, 1955
Brookside Farms, Inc.	Apr. 22, 1955	Oct. 15, 1955
Gold Farms, Inc.	Apr. 22, 1955	Oct. 15, 1955
Sugar Daddy, Inc.	Apr. 22, 1955	Oct. 24, 1955
Lion Farms, Inc.	Apr. 22, 1955	Oct. 14, 1955
Shannon Farms, Inc.	May 11, 1955	Oct. 14, 1955
Girard Farming Co.	May 19, 1955	(not shown)

(Each of the above-named corporations will be identified hereinafter by the first word of its name, as "Best," "Vegetable," "Imperial," etc.)

Petitioner was named president, his son Maxwell Weinberg vice president, and another son Dale Weinberg secretary and treasurer, and all of these officers were named directors, of each of the corporations. The articles of incorporation of all of the corporations are alike and provide, generally, for the conduct of farming operations.

In the latter part of February 1955, petitioner made a survey of the Imperial Valley farms and informed the Holtville partnership and Bedwell that he was going to transfer his interest in certain of the growing crops on the farms to the several corporations and that these crops were to be harvested and sold for the corporations and not for his personal account. He designated field-by-field the crops which were to be transferred to each corporation.

Thereafter, the crops designated for transfer to the several corporations were harvested and sold and the proceeds of the sales were deposited in bank accounts in the name of the corporations. The sugarbeets were all delivered and sold to Holly Sugar Corporation, hereinafter referred to as "Holly," and, in payment therefor, Holly, under previous instructions from petitioner, drew drafts payable to the corporation which petitioner had designated to receive them. For instance, over the period June 15, 1955 to May 31, 1956, Holly issued drafts payable to Shannon for sugarbeets purchased on the dates and in the amounts as follows:

Draft No.	Date	Amount
9068	6/15/55	$12,435.03
7198	6/30/55	11,705.47
7217	7/ 7/55	4,825.82
7688	12/ 1/55	273.92
7689	12/ 1/55	1,407.25
8069	1/25/56	2,809.43
8068	1/25/56	546.11
1786	5/31/56	278.55
1787	5/31/56	1,435.03
	Total	35,716.61

After the beet harvest was completed, petitioner's attorney prepared bills of sale by which petitioner purported to transfer to each corporation the exact tonnage of beets delivered and sold to Holly for its account. The bills of sale were predated to the date of the first directors' meeting held by the corporation designated to receive the proceeds. The same general plan was followed with the lettuce and other produce harvested and sold to other buyers. All parties concerned treated the produce, or proceeds from its sale, as property of the several corporations which petitioner had designated to receive them. All of the crops were actually harvested after the dates appearing on the bills of sale.

The produce which was to be shipped by rail was loaded on cars as it was harvested and when each car was sold, a jacket was placed on it designating the corporation for whose account it was harvested and sold as the seller and showing the contents of the car, the purchaser, and the selling price.

Certain expenses relating to shipping the produce, such as brokerage and car refrigeration, were paid by the corporations. These expenses were recorded in the separate accounts of the corporations and claimed as deductions in their income tax returns. The other general expenses of harvesting were paid either by the Holtville partnership or petitioner. None of the corporations engaged in any farming activities of their own until after the close of their 1955 fiscal years.

There were 12 of the bills of sale bearing 1955 dates, all of which described certain quantities of harvested crops. Thereafter, petitioner executed six additional bills of sale, each dated March 15, 1956, purporting to assign to one of the corporations "all of the Sugar Beets currently growing on the following described property" and containing a description of the farmlands on which the beets were growing. Typical of each group of bills of sale are the following, which were issued to Chief and Sugar:

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that I, ADOLPH WEINBERG, as a capital contribution to CHIEF FARMS, INC., a California corporation, do hereby transfer to CHIEF FARMS, INC., the following described agricultural crops.

Sugar Beets - 1,496.6045 Tons

And I hereby covenant that I am the lawful owner of said goods; that they are free from all encumbrances; that I have the right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of May, 1955.

/s/ Adoph Weinberg
ADOLPH WEINBERG

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS that I, ADOLPH WEINBERG, as a capital contribution to SUGAR DADDY, INC., a California corporation, do hereby transfer to SUGAR DADDY, INC., all of the Sugar Beets currently growing on the following described property:

> One half of the 174.1 Acres, S 1/2 of Section 22, T. 12, R. 15, EXCEPT the West 80 Acres, Nutmeg Canal, Gates 6 & 7.

And I hereby covenant that I am the lawful owner of said goods; that they are free from all encumbrances; that I have the right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of March, 1956.

/s/ Adolph Weinberg
ADOLPH WEINBERG

Following is a description of the produce purportedly assigned to each of the corporations by the bills of sale referred to above and the dates appearing thereon:

Corporation	Crop	Date
Vegetable Farming Co.	Lettuce 9,798 crates (2 doz. size) 2,635 crates (2-1/2 doz. size) 400 crates (4 doz. size) 1,227 ctns. (40 lbs. ea.) 3,417 wooden crates (72 lbs. ea.)	3/11/55
Lettuce Farming Co.	Lettuce 15,827 crates (2 doz. size) 650 crates (4 doz. size) 1,227 ctns. (40 lbs. ea.) 3,417 wooden crates (72 lbs. ea.)	3/11/55
Imperial Lettuce Farms, Inc.	Lettuce 12,950 crates (2 doz. size) 1,279 crates (2-1/2 doz. size) 201 crates (4 doz. size)	3/14/55
Best Lettuce Co.	Lettuce 18,479 crates (2 doz. size) 642 crates (2-1/2 doz. size) 1,227 ctns. (40 lbs. ea.) 3,417 wooden crates (72 lbs. ea.)	3/29/55
A. W. Farms Co.	Barley—564.2375 Tons Carrots—15,220 50# bags 312 75# bags 117 65# bags	3/29/55
Parsons Farms, Inc.	Sugar Beets—3443.3865 Tons	4/22/55
Brookside Farms, Inc.	Sugar Beets—3443.3865 Tons	4/22/55
Lion Farms, Inc.	Sugar Beets—2,536.9870 Tons	4/29/55
Sugar Daddy, Inc.	Flax—155.17 Tons Barley—371.235 Tons	5/ 4/55
Chief Farms, Inc.	Sugar Beets—1,496.6045 Tons	5/ 4/55
Gold Farms, Inc.	Sugar Beets—2,535.5205 Tons	5/ 9/55
Shannon Farms, Inc.	Sugar Beets—2894 Tons	5/18/55
Sugar Daddy, Inc.	Sugar Beets on described property	3/15/56
Imperial Lettuce Farms, Inc.	Sugar Beets on described property	3/15/56

Lettuce Farming Co.	Sugar Beets on described property	3/15/56
Girard Farming Co.	Sugar Beets on described property	3/15/56
Lion Farms, Inc.	Sugar Beets on described property	3/15/56
Best Lettuce Co.	Sugar Beets on described property	3/15/56

The books and records of the Holtville partnership were kept by one of the three partners, E. N. D. Hatch, who handled the partnership's sales of produce. Hatch first learned that petitioner was organizing the corporations in a telephone conversation with petitioner's accountant in late February 1955. He was told that petitioner's interest in the crops from certain farmlands had been assigned to the several corporations and that he would be furnished a list of the crops belonging to each corporation. Petitioner gave similar notice to Holly. The harvesting of the first of these crops, the sugarbeets, was begun early in March 1955. As sales of the produce were made, the proceeds were deposited by Holly in separate accounts in local banks to the credit of the corporations designated to receive them. The bank accounts for the corporations were opened by Hatch for that purpose. Deposit slips were made out for each deposit and a copy was sent to petitioner's accountant.

The corporations all adopted, for accounting purposes, fiscal years as follows: Lion, Gold, and Chief adopted the fiscal year ending August 31; E T, the fiscal year ending February 28; Lettuce, Vegetable, Best, and Imperial, the fiscal year ending March 31; Girard, the fiscal year ending April 30; Shannon, Brookside, Parsons, and A. W., the fiscal year ending June 30; and Sugar, the

fiscal year ending July 31. Their returns were filed on the basis of such fiscal years.

The crops grown by the Holtville partnership, those in which petitioner had an interest, included about 600 acres of lettuce, 200 acres of carrots, 135 acres of beets, 80 acres of flax, and 30 or 40 acres of cabbage.

Loans amounting to $280,900 were made by the several corporations in 1955 to Coast Grain Company on its 6 months' promissory notes bearing 6 percent interest. The moneys were used by Coast Grain Company for loans to its customers.

All of the petitioner corporations have continued in existence up to the present time. They have all regularly kept separate books and accounts and have filed income tax returns showing their receipts from the sale of farm produce and expenses incurred in their operations. Some of them, from time to time, have entered into lease agreements and partnership agreements with third parties pertaining to farming operations. Petitioner has continued as their president and sole stockholder and has conducted most of their affairs. As president of the corporations, he performed about the same services on their behalf as he had previously performed on his own behalf, such as acquiring leases, contracting with farmers, and financing farm operations. The corporations did not do the actual farming.

The assigned crops were given a cost basis of zero both by petitioner and the corporations. The books and records and returns of neither petitioner nor the corporations show any gain or loss on petitioner's assignment of produce to the corporations or his receipt of the corporations' stock.

In its partnership returns for the calendar years 1955 and 1956, the Weinberg partnership reported total income in the respective amounts of $436,586.30 and $429,634.92. These amounts included rentals from "Imperial Valley Ranches" of $159,829.50 in 1955 and $169,283.48 in 1956 and interest in the respective amounts of $102,889.07 and $81,406.91. Neither the partnership nor petitioner individually reported any income from the sale of farm produce by or on behalf of any of the corporations. The several corporations reported total income of $239,994 in 1955 and $177,086.12 in 1956.

In March 1955, E T formed a partnership with Stafford-Hannon to raise cotton on approximately 700 acres of Imperial Valley farmland. Hannon agreed to lease the land to the partnership for one quarter of the cotton produced, with a guaranteed rental of $60 per acre, and was to receive a salary of $6,400 per year. The partnership profits and losses were to be shared equally by Hannon and E T. The partnership reported net profits of $4,841.12 in the calendar year 1955 and $10,767.95 in 1956.

Respondent determined in his notice of deficiencies to Adolph and Etta Weinberg that the 14 above-named corporations are not recognizable tax entities and that the income reported by them in 1955 and 1956 is all taxable to them (Adolph and Etta Weinberg). He further determined in deficiency notices to the several corporations that they were entitled, collectively, to only one surtax exemption. The deficiencies determined against them result entirely from this adjustment. He made no changes in the income and expenses reported by the corporations in their returns.

Income tax returns for the several corporations for their respective fiscal years ending in 1955 were all filed on the same date, October 17, 1955. For some of the corporations the returns were timely and for others, including A. W., Best, Brookside, Imperial, Lettuce, Parsons, Shannon, and Vegetable, they were delinquent. The reasons given for the belated filings were that petitioner was in Europe at the time for filing and his accountant who had been instructed to file the returns negligently failed to do so.

The stipulated facts are included herein by this reference.

OPINION

In his notice of deficiencies to Adolph and Etta Weinberg, Docket No. 93361, respondent determined that the 14 above-named corporations were not recognizable tax entities and that the income attributed to them was all income of the Weinberg partnership. He further alleged "in the alternative" that if such corporations are entitled to recognition, then, clearly to reflect income, either the proceeds from the sale of the crops should be imputed to the partnership which performed all of the services and bore all the expenses of producing the crops or the costs of production should be allowed as deductions to the corporations and not the partnership.

Petitioners alleged in their petition that:

> (d) The Commissioner erred in determining that the income reported by each of the corporations was properly reportable by the Adolph and Etta Weinberg Partnership or by the petitioners.

(e) The Commissioner erred in determining that the Adolph and Etta Weinberg Partnership created or earned or controlled the income of each of the corporations.

These allegations are denied, generally, in respondent's answer. Counsel for respondent in his opening statement at the trial stated:

> Respondent expects the evidence in this case to show that neither harvested nor unharvested crops were transferred to these corporations but rather the proceeds from the sale of these crops were given to the corporations as capital.
>
> These proceeds were income to the individual petitioners which they attempted to assign to the corporations before including it in their own income.

In his briefs respondent's chief argument is that the proceeds from the sale of the crops should be included in the income of the Weinberg partnership for the reason that the harvested crops were in fact sold by the partnership and the income realized by the partnership. This contention, we think, is not a departure from respondent's determination or the pleadings, but merely offers a different reason than that advanced in the notice of deficiency for the inclusion of the proceeds from the crop sales in the partnership income.

On the evidence of record we think the factual conclusion is inevitable that what was assigned to the several corporations in exchange for their stock was not crops, either growing or harvested, but the proceeds from the sale of the crops. The only tangible evidence of any actual transfers to the corporations are the bills

of sale made out by the petitioners to the corporations allegedly in part consideration for their stock. The purported assignments in the twelve 1955 bills of sale were of certain specified crops, such as so many tons of beets or so many crates of lettuce. Taken at face value these bills of sale would indicate that what was assigned to the corporations was harvested, and not growing, crops as petitioners contend. However, at the time when the bills of sale were executed, the crops had all been harvested and sold and the proceeds deposited in bank accounts of the several corporations.

At the trial respondent presented evidence tending to show that none of the bills of sale were in fact prepared until sometime during 1958 or early in 1959, and about a year after the examining revenue agent had requested them. The dates appearing on the bills of sale and the actual dates of their execution are, we think, of no great importance here. It is not disputed that these bills of sale were all executed after the crops had been harvested and sold and were predated to coincide with the first meetings of the corporations' boards of directors. Likewise, the minutes of the corporations relating to the issuance of their stock show that they too were predated. For instance, the minutes of the first meeting of the directors of Sugar Daddy, Inc.,[2] dated May 4, 1955, denoted an acceptance from petitioners, in payment of its capital stock, of the same quantity of barley and flax described in the predated bill of sale bearing the same date. Until the harvesting was completed, there was no way in which the exact quan-

[2]It was stipulated that the minute book of Sugar Daddy, Inc., should be received in evidence as typical of those of the other corporations.

tities of the crops specified in the bills of sale and the minutes could be ascertained.

The "growing crops" referred to in the bills of sale bearing 1956 dates were harvested and sold in the same manner. These bills of sale purported to represent additional contributions of capital to the corporations.

On the evidence before us we determine that petitioners transferred to the corporations neither growing nor matured crops but the proceeds from the sale of crops. These transfers occurred independently of the bills of sale when, under petitioners' direction, the proceeds from the sales were deposited in the corporations' bank accounts. We further determine that the crops were the property of the partnership at the time they were sold and that the proceeds from the sales were the income of the partnership.

In their briefs petitioners state:

> The purported inclusion by the respondent of the proceeds from the sales of the farm crops transferred to the corporations in 1955 in the income of Adolph is an attempt by the respondent to disregard the provisions of Section 351 of the Code, which prohibits the recognition of any gain or loss to Adolph on the transfer of the farm crops to the corporations in exchange for their stock. This, the Commissioner has no power to do. *Hanover Bank v. Comm'r.*, 369 U.S. 672, 687-688 (1962), 62-1 U.S.T.C. Para. 9487; *Lewyt Corp. v. Comm'r.*, 349 U.S. 237 (1955) 75 S. Ct. 736, 55-1 U.S.T.C. Para. 9470; *South Lake Farms, Inc., supra.* * * *

What respondent has included in petitioners' income is not the gain from the transfer of the crops to the

several corporations in exchange for their stock but rather the entire purchase price paid on the sale to third parties of the crops themselves.

In *South Lake Farms, Inc.*, 36 T.C. 1027, affd. 324 F.2d 837, we held that a transfer of land and leaseholds and the growing crops thereon by one corporation to another in complete liquidation of the transferor corporation, did not result in any gain to the transferor. The decision turned on the fact that there was a transfer of the land and leaseholds, as well as the growing crops, before any of the crops had been harvested and sold. It was based largely on our decision in *Elsie SoRelle*, 22 T.C. 459. There, a father had made gifts to his children of several parcels of land, together with the crops growing thereon. We held that the income from the sale of the crops was taxable to the children and not the father. In that case we relied largely upon *Pearce v. Commissioner*, 315 U.S. 543, where a wife, and not the husband, was held taxable on the income from an annuity contract which the husband had purchased for her in a predivorce agreement. The Court distinguished the *Horst, Eubank,* and *Harrison v. Schaffner*[3] cases on the grounds that the husband had parted with not only the right to receive the income but the corpus which produced it.

In the instant case, petitioner did not purport to transfer to the corportions any land or leaseholds, but only the crops growing thereon. As stated above, the only tangible evidence of any transfers to the corporations are the bills of sale. Those dated in 1955 speci-

[3] *Helvering v. Horst*, 311 U.S. 112.
Helvering v. Eubank, 311 U.S. 122.
Harrison v. Schaffner, 312 U.S. 579.

fied certain crops and produce which had already been harvested and sold. Actually, since the crops had already been sold, the only thing relating to the crops petitioners could have owned, or assigned to the corporations at that time, were the proceeds from the sales of the crops.

It is argued by petitioners that the agreements between petitioners and the corporations regarding the assignment of growing crops should be construed according to the intention of the parties which, they argue, was that ownership of the growing crops should vest in the corporations at or about the time petitioners informed the farmers and buyers that the crops from certain designated fields would belong to the corporations. Any such agreement would have had to be between petitioner, representing the Weinberg partnership, and the directors of the several corporations. There is no proof of such an agreement. At most, there was only petitioner's expressed intention to sometime in the future assign the growing crops to the corporations.

The situation with respect to the 1956 bills of sale is somewhat different in that these bills of sale did specify the "growing crops" on certain farms. However, the evidence is that these crops were handled in the same manner as those referred to in the 1955 bills of sale and, we think, with the same tax consequences.

Aside from the normally difficult factual and legal questions presented, we are here confronted with a confused situation in the evidence. The parties have stipulated that the stock of each of the corporations was issued to petitioners "in exchange for $1,000 cash and farm crops." This stipulation is not inconsistent with respondent's first alternative determination that—

> inasmuch as the partnership performed the services and incurred all of the expenses attributable to the matured crops which were transferred to the fourteen corporations, the sales proceeds should be imputed to the partnership in order clearly to reflect income.

However, the evidence of record, we think, clearly shows, and we have determined, that the proceeds from the sale of the crops, rather than growing or matured crops themselves, were transferred to the corporations by petitioners in exchange for their stock. Respondent makes this argument, for the first time, in his final brief and further argues that the stipulation to the contrary should be disregarded. He points out that the stipulation was filed at the opening of the trial before introduction of the evidence showing the predating of the bills of sale and corporate minutes and that it is not inconsistent with any position then taken by respondent in his determination of the deficiencies.

In our study of the evidence as a whole we are convinced that the stipulation is erroneous and that, as we have found, it was cash proceeds from the sale of the crops that were transferred to the corporations in exchange for their shares of stock.

The wording of the stipulation (as to the stock issued by Chief Farms, Inc.) is that—

> A permit authorizing the issuance of stock was duly issued by the California Commissioner of Corporations on October 24, 1955, pursuant to the application of CHIEF therefor and the stock was duly issued to ADOLPH on October 30, 1955, in exchange for said $1,000.00 cash and farm crops.

The stipulation as to the other corporations is in the same language. We take the stipulation to mean no more than that the stock of the corporations was issued *nominally* for $1,000.00 cash and farm crops. At the time the stipulation was prepared, there was no contention between the parties as to whether farm crops or the equivalent in cash was paid in for the stock. Respondent was then relying on his determination that the corporations, in any event, were not entitled to recognition as tax entities. The stipulation could not have been intended to foreclose inquiry as to whether crops or the cash equivalent was paid in for stock. That question had never been raised.

Even if construed literally the stipulation would have to be rejected as being contrary to the preponderance of the other evidence. *William Ernest Seatree,* 25 B.T.A. 396, affd. 72 F.2d 67. We said in that case:

> It is stipulated that the assignment was executed and delivered to the Equitable Trust Company on June 29, 1922. We refuse to be bound by that stipulation, for it appears to be contrary to fact as disclosed by the record. * * *

And see *Gunderson Bros. Engineering Corp.,* 42 T.C. 419, 436.

For other reasons, too, we think respondent's determination that the income from the sale of the crops allegedly assigned to the corporations must be included in the income of the Weinberg partnership should be sustained. In *United States v. Lynch,* 192 F.2d 718, the income from the sale of apples which a storage and warehouse corporation had purportedly distributed in kind to its stockholders but actually retained in its pos-

session and sold in the course of its regular business was held taxable to the corporation. The Court said:

> We understand appellant to contend that the income in question is not that of the corporation. The answer is, that the corporation has performed the services which create the right to the income which brings into play the basic rule that income shall be taxed to him who earns it. Helvering v. Eubank, 1940, 311 U.S. 122, 61 S.Ct. 149, 85 L. Ed. 81. A corporate liquidation and transfer of assets cannot divert taxability of income already earned any more than does an assignment of such income. Cf. Helvering v. Horst, 1940, 311 U.S. 112, 61 S.Ct. 144; 85 L.Ed. 75; Helvering v. Eubank, supra:

To the same effect is *A.B.C.D. Lands, Inc.*, 41 T.C. 840, where the corporate taxpayer distributed to its stockholders in kind the warehouse receipts from grain which its tenant farmers had produced and delivered to a storage terminal. We held that this was an attempted anticipatory assignment of income which was taxable to the corporation.

The same basic principle applies here. Practically all of the services contributing to the production of the income were performed by petitioner or those representing the partnership. In a very true sense the income was all earned by the petitioners.

The impact of the *Lynch* and *A.B.C.D. Lands, Inc.*, cases and the authorities there relied upon is not lessened by the fact that the purported assignments of the crops here were made by the stockholder to his corporations rather than by a corporation to its stockholders. Nor does the applicability of the rule require a determination as to whether there were effective assignments of growing or harvested crops. If the as-

signments were of income already earned whether or not their purpose was tax avoidance, they do not shift the burden of tax on such income.

There is no doubt in our minds, however, that tax avoidance was at least one of the purposes of the attempted assignment of the growing crops to the corporations. If the corporations had been organized primarily for the other purposes claimed by petitioner,[4] no plausible reason has been shown why the growing crops should have been assigned to them. Up to the time the crops were harvested and sold the corporations were mere shells without any assets or business activities. When the corporations did come into funds after and from the sale of the crops, they loaned the money to another of petitioner's corporations, Coast Grain Company.

With this disposition of the principal issue it becomes unnecessary to decide the other issues raised in the pleadings. The elimination from the corporations' income of the proceeds from the sale of the crops allegedly assigned to them leaves them without any income or tax liability in the years before us. We note that counsel for respondent was unable or unwilling to say at the time of the hearing what position the Commissioner of Internal Revenue is taking with respect to the recognition of the corporations as separate tax entities in years subsequent to 1955.

Decisions will be entered under Rule 50.

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[4]Petitioner has undertaken to show that his chief purposes in organizing the corporations were to be able to divide his farming business among his children and grandchildren and to avoid individual risks in his farming operations. The facts are however that he has not yet made any transfers of the stock of any of the corporations and it has not been shown to what extent, if any, his personal risks on his farming business were lessened.

APPENDIX C.

Report of Commissioner to the Chief Judge of the Tax Court of the United States.

Tax Court of the United States

Adolph Weinberg and Etta Weinberg, Sugar Daddy, Inc., et al[1] Petitioners, v. Commissioner of Internal Revenue, Respondent. Docket Nos. 93361, 93353, 93354, 93362, 93363, 93364, 93365, 93366, 93367, 93368, 93369, 93370, 93371.

Richard A. Del Guercio and *Ronald J. Del Guercio*, for the petitioners.

Marion Malone, for the respondent.

Pursuant to Order Designating Commissioner of April 3, 1964 in the above-entitled proceedings, the following report of Findings of Fact is submitted:

1. Petitioners Adolph and Etta Weinberg are husband and wife, residing at Norwalk, California. They filed joint returns for the calendar years 1955 and 1956. The term "petitioner," as hereinafter used, will refer to Adolph Weinberg unless otherwise indicated. The other petitioners are California corporations with their principal offices located at the same business address as petitioner, 12948 South Pioneer Boulevard, Norwalk, California. All of the petitioners filed their returns with the director of internal revenue at Los Angeles.

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[1]Consolidated herewith are: Vegetable Farming Co., Docket No. 93354; A. W. Farms Co., Docket No. 93362; Best Lettuce Co., Docket No. 93363; Brookside Farms, Inc., Docket No. 93364; Chief Farms, Inc., Docket No. 93365; Girard Farming Co., Docket No. 93366; Imperial Lettuce Farms, Inc., Docket No. 93367; Lettuce Farming Co., Docket No. 93368; Lion Farms, Inc., Docket No. 93369; Parsons Farms, Inc., Docket No. 93370; Shannon Farms, Inc., Docket No. 93371.

Their returns were made, and their books and records kept, on a cash receipts and disbursements method of accounting. The returns filed by petitioner and his wife were made on a calendar year basis and those for the corporate taxpayers were for fiscal years corresponding to their various accounting periods.

2. During the taxable years and at all times here material petitioner was engaged in farming in the Imperial Valley, County of Imperial, California. Most of his farming operations during 1955 and 1956 were conducted through a partnership composed of himself and his wife and known as the "Adolph and Etta Weinberg partnership." This partnership will be referred to hereinafter as "the Weinberg partnership."

3. Imperial Valley is a highly productive farming and citrus-growing area located about 200 miles south of Norwalk, California, and extending approximately 70 miles north and south and 30 miles east and west.

4. Petitioner has been engaged in farming and related business in that area for a number of years. He is president of Coast Grain Company, a corporation engated in the dairy and cattle feed business at Norwalk, and devotes most of his time to that business. Coast Grain Company made loans in large amounts to its customers for financing their farm and livestock operations.

5. In his farming operations petitioner purchases or leases a tract of land and engages a farmer, either an individual, corporation, or partnership, to grow the crops, usually on a share-crop or profit sharing basis.

6. In 1952 petitioner entered into a farming venture with another partnership, Hopeville Vegetable Company. This partnership, hereinafter referred to as

"the Hopeville partnership," was composed of three partners, unrelated to petitioner. Under the terms of the partnership agreement, petitioner was to finance certain farm operations and the partnership was to manage the farms and do all of the farm work. The profits were to be divided 47½ percent to petitioner and 52½ percent to the partnership. About 1,100 acres of farmlands, known as the Coppinger properties, consisting of a number of different tracts of land, were involved. The land was then under lease to the Hopeville partnership, which subleased it to petitioner.

7. In 1952 petitioner leased other farmlands which he placed under the management of another grower, James Bedwell, on a salary basis.

8. The principal crops grown on the farms in which petitioner had an interest were cotton, sugar beets, alfalfa, flax, barley, lettuce, and carrots. For cotton, the land is prepared and seeded in January and February and the crops harvested in the same months of the following year. For the other crops, except alfalfa, the seeding is done in July, August, and September and the harvesting in the spring and early summer of the following year. Alfalfa is usually a three-year crop with several annual cuttings over the period from January to September.

9. Farming in Imperial Valley, as elsewhere, generally is a hazardous occupation depending on weather conditions, the adaptability of the soil to different types of crops planted thereon, the extent of insect infestation, and other factors. In the first two years of its existence, 1952 and 1953, the Hopeville partnership sustained operating losses, petitioner's share of which amounted to approximately $100,000.

10. In February 1955 petitioner had a conference with his accountants and attorney for the purpose of reviewing and reorganizing his business affairs. He was not in too good health and, on his doctor's advice, was contemplating a trip of several months to Europe. It was decided at the conference that petitioner would turn over some or all of his farming business to a number of corporations to be organized for that purpose. Petitioner instructed his attorney to form the proposed corporations and stated that he would go to Imperial Valley and analyze the remaining unharvested fields and would transfer certain growing crops and $1,000 in cash to each of the corporations in exchange for all of its capital stock. Accordingly, articles of incorporation for the proposed corporations were prepared by the attorney and were filed with the Secretary of State of California. The following table shows the dates on which the articles of incorporation for each corporation were filed and the dates on which its stock was issued:

Corporation	Articles of incorporation filed	Stock issued
Best Lettuce Co.	Mar. 4, 1955	Oct. 30, 1955
Vegetable Farming Co.	Mar. 4, 1955	Oct. 24, 1955
Imperial Lettuce Farms, Inc.	Mar. 4, 1955	Nov. 15, 1955
Lettuce Farming Co.	Mar. 4, 1955	Nov. 15, 1955
A. W. Farms Co.	Mar. 9, 1955	Nov. 15, 1955
E T Farming Co.	Mar. 9, 1955	Dec. 22, 1955
Chief Farms, Inc.	Apr. 22, 1955	Oct. 30, 1955
Parsons Farms, Inc.	Apr. 22, 1955	Nov. 16, 1955
Brookside Farms, Inc.	Apr. 22, 1955	Oct. 15, 1955
Gold Farms, Inc.	Apr. 22, 1955	Oct. 15, 1955
Sugar Daddy, Inc.	Apr. 22, 1955	Oct. 24, 1955
Lion Farms, Inc.	Apr. 22, 1955	Oct. 14, 1955
Shannon Farms, Inc.	May 11, 1955	Oct. 14, 1955
Girard Farming Co.	May 19, 1955	(not shown)

(Each of the above-named corporations will be identified hereinafter by the first word of its name, as "Best," "Vegetable," "Imperial," etc.)

11. Pursuant to applications for the issuance of stock filed by the corporations with the Treasurer of Corporations of the State of California, all of their stock was issued to petitioner either in the latter part of 1955 or early in 1956, as shown above.[2]

12. Petitioner was named president, his son Maxwell Weinstein vice-president, and another son, Dale Weinstein, secretary and treasurer, and all of these officers were named directors, of each of the corporations. The articles of incorporation of all of the corporations are alike and provide, generally for the conduct of farming operations.

13. In the latter part of February 1955 petitioner made a survey of the Imperial Valley farms and informed the Hopeville partnership and Bedwell that he was going to transfer his interest in certain of the growing crops on the farms to the several corporations and that these crops were to be harvested and sold for the corporations and not for his personal account. He designated field-by-field the crops which were to be transferred to each corporation.

14. Thereafter, the crops designated for transfer to the several corporations were harvested and sold and the proceeds of the sales were deposited in bank accounts in the name of the corporations. The sugar beets were all delivered and sold to Holly Sugar Corporation, hereinafter called "Holly," and in payment therefor Holly, under instructions from petitioner, drew drafts payable to the corporation which petitioner had designated to receive them. For instance, over the period June 15, 1955 to May 31, 1956, Holly issued drafts

[2]It is stipulated that the stock of all the corporations except E T and Girard was issued "in exchange for said $1,000 and farm crops."

payable to Shannon for sugar beets purchased for its account on the dates and in the amounts as follows:

Draft No.	Date	Amount
9068	6/15/55	$12,435.03
7198	6/30/55	11,705.47
7217	7/ 7/55	4,825.82
7688	12/ 1/55	273.92
7689	12/ 1/55	1,407.25
8069	1/25/56	2,809.43
8068	1/25/56	546.11
1786	5/31/56	278.55
1787	5/31/56	1,435.03
	Total	$35,716.61

15. When the beet harvest was completed, petitioner's attorney prepared bills of sale by which petitioner purported to transfer to each corporation the exact tonnage of beets delivered and sold to Holly for its account. The bills of sale were pre-dated to the date of the first directors' meeting held by the corporation designated to receive the proceeds. They were then attached to the application for stock-issue permits which the corporations filed with the California Division of Corporations. The same general plan was followed with the lettuce and other produce harvested and sold to other buyers. All parties concerned treated the produce and proceeds from its sale as property of the several corporations which petitioner had designated to receive them. All of the crops were actually harvested after the dates appearing on the bills of sale.

16. The produce which was to be shipped by rail was loaded on cars as it was harvested and when each car was sold a jacket was placed on it designating the corporation for whose account it was harvested and sold as the seller and showing the contents of the car, the purchaser, and the selling price.

17. Certain expenses relating to shipping the produce, such as brokerage and car refrigeration, were

paid by the corporations. These expenses were recorded in the corporations' separate accounts and claimed as deductions in their income tax returns. The other general expenses of harvesting were paid either by the Hopeville partnership or petitioner. None of the corporations engaged in any farming activities of its own until after the close of their 1955 fiscal years.

18. There were 12 of the 1955 bills of sale, all of which described certain quantities of harvested crops. On May 15, 1956, petitioner executed 6 additional bills of sale, each purporting to assign to one of the corporations "all of the Sugar Beets currently growing on the following described property" and bearing a description of the farmlands on which the beets were growing. Typical of each group of bills of sale are the following, which were issued to Chief and Sugar:

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that I, ADOLPH WEINBERG, as a capital contribution to CHIEF FARMS, INC., a California corporation, do hereby transfer to CHIEF FARMS, INC., the following described agricultural crops:

Sugar Beets - 1,496.6045 Tons

And I hereby covenant that I am the lawful owner of said goods; that they are free from all encumbrances; that I have the right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of May, 1955.

/s/ Adolph Weinberg
ADOLPH WEINBERG

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that I, ADOLPH WEINBERG, as a capital contribution to SUGAR DADDY, INC., a California corporation, do hereby transfer to SUGAR DADDY, INC., all of the Sugar Beets currently growing on the following described property:

> One half of the 174.1 Acres, S ½ of Section 22, T. 12, R. 15, EXCEPT the West 80 Acres, Nutmeg Canal, Gates 6 & 7.

And I hereby covenant that I am the lawful owner of said goods; that they are free from all encumbrances; that I have the right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of March, 1956.

/s/ Adolph Weinberg
ADOLPH WEINBERG

19. Following is a description of the produce purportedly assigned to each of the corporations by the bills of sale referred to above and the dates appearing thereon:

Corporation	Crops	Date
Vegetable Farming Co.	Lettuce 9,798 crates (2 doz. size) 2,635 crates (2-1/2 doz. size) 400 crates (4 doz. size) 1,227 ctns. (40 lbs. ea.) 3,417 wooden crates (72 lbs. ea.)	3/11/55
Lettuce Farming Co.	Lettuce 15,827 crates (2 doz. size) 650 crates (4 doz. size) 1,227 ctns. (40 lbs. ea.) 3,417 wooden crates (72 lbs. ea.)	3/11/55
Imperial Lettuce Farms, Inc.	Lettuce 12,950 crates (2 doz. size) 1,279 crates (2-1/2 doz. size) 201 crates (4 doz. size)	3/14/55
Best Lettuce Co.	Lettuce 18,479 crates (2 doz. size) 642 crates (2-1/2 doz. size) 1,227 ctns. (40 lbs. ea.) 3,417 wooden crates (72 lbs. ea.)	3/29/55
A. W. Farms Co.	Barley—564.2375 Tons Carrots—15,220 50# bags 312 75# bags 117 65# bags	3/29/55
Parsons Farms, Inc.	Sugar Beets—3443.3865 Tons	4/22/55
Brookside Farms, Inc.	Sugar Beets—3443.3865 Tons	4/22/55
Lion Farms, Inc.	Sugar Beets—2,536.9870 Tons	4/29/55
Sugar Daddy, Inc.	Flax—155.17 Tons Barley—371.235 Tons	5/ 4/55
Chief Farms, Inc.	Sugar Beets—1,496.6045 Tons	5/ 4/55
Gold Farms, Inc.	Sugar Beets—2,535.5205 Tons	5/ 9/55
Shannon Farms, Inc.	Sugar Beets—2894 Tons	5/18/55
Sugar Daddy, Inc.	Sugar Beets on described property	3/15/56
Imperial Lettuce Farms, Inc.	Sugar Beets on described property	3/15/56

Lettuce Farming Co.	Sugar Beets on described property	3/15/56
Girard Farming Co.	Sugar Beets on described property	3/15/56
Lion Farms, Inc.	Sugar Beets on described property	3/15/56
Best Lettuce Co.	Sugar Beets on described property	3/15/56

20. The books and records of the Hopeville partnership were kept by one of the three partners, E. N. D. Hatch, who handled the partnership's sales of produce. Hatch first learned that petitioner was organizing the corporations for the purpose of taking over his farming business in a telephone conversation with petitioner's accountant in late February 1955. He was told that petitioner's interest in the crops from certain farmlands had been assigned to the several corporations and that he would be furnished a list of the crops belonging to each corporation. Petitioner gave similar notice to Holly. The harvesting of the first of these crops, the Sugar Beets, was begun early in March 1955. As sales of the produce were made, the proceeds were deposited by Holly in separate accounts in local banks to the credit of the corporations designated to receive them. The bank accounts for the corporations were opened by Hatch for that purpose. Deposit slips were made out for each deposit and a copy was sent to petitioner's accountant.

21. The corporations all adopted, for accounting purposes, fiscal years corresponding to the crop years for the crops which each was designated to receive, as follows: Lion, Gold, and Chief adopted the fiscal year ending August 31; E T, the fiscal year ending February 28; Lettuce, Best, and Imperial, the fiscal year ending

March 31; Girard, the fiscal year ending April 30; Shannon, Brookside, Parsons, and A. W., the fiscal year ending June 30; and Sugar, the fiscal year ending July 31. Their returns were filed on the basis of such fiscal years.

22. The crops grown by the Hopeville partnership, those in which petitioner had an interest, included about 600 acres of lettuce, 200 acres of carrots, 135 acres of beets, 80 acres of flax, and 30 or 40 acres of cabbage.

23. Most of the proceeds from the sale of the crops in 1955 and 1956 were withdrawn from the bank accounts of the several corporations and loaned to Coast Grain Company on its 6-months promissory note. The monies were used by Coast Grain Company for loans to its customers. Interest at the rate of 6 percent was paid to the corporations on those notes. The total of the corporations' loans to Coast Grain Company amounted to $280,900.00 at December 31, 1955 and $309,211.70 at December 31, 1956.

24. All of the petitioner corporations have continued in existence up to the present time. They have all regularly kept separate books and accounts and have filed income tax returns showing their receipts from the sale of farm produce and expenses incurred in their operations. Some of them, from time to time, have entered into lease agreements and partnership agreements with third parties pertaining to farming operations. Petitioner has continued as their president and sole stockholder and has conducted most of their affairs. As president of the corporations, he performed about the same services on their behalf as he had previously performed on his own behalf, such as acquiring leases,

contracting with farmers, and financing farm operations. The corporations did not do the actual farming.

25. The assigned crops were given a cost basis of zero both by petitioner and the corporations. The books and records and returns of neither petitioner nor the corporations show any gain or loss on petitioner's assignment of produce to the corporations or his receipt of the corporations' stock.

26. In its partnership returns for the calendar years 1955 and 1956, the Weinberg partnership reported total income in the respective amounts of $436,586.30 and $429,634.92. These amounts included rentals from "Imperial Valley Ranches" of $159,829.50 in 1955 and $169,283.48 in 1956 and interest in the respective amounts of $102,889.07 and $81,406.91. Neither the partnership nor petitioner individually reported any income from the sale of farm produce by or on behalf of any of the corporations. The several corporations reported total income of $239,994.00 in 1955 and $177,086.12 in 1956.

27. In March 1955, E T formed a partnership with Stafford-Hannon to raise cotton on approximately 700 acres of Imperial Valley farmland. Hannon agreed to lease the land to the partnership for one quarter of the cotton produced, with a guaranteed rental of $60 per acre, and was to receive a salary of $6,400 per year. The partnership profits and losses were to be shared equally by Hannon and E T. The partnership reported net profits of $4,841.12 in the calendar year 1955 and $10,767.95 in 1956.

28. Respondent determined in his notice of deficiencies to Adolph and Etta Weinberg that the 14 above-

named corporations are not recognizable tax entities and that the income reported by them in 1955 and 1956 is all taxable to them (Adolph and Etta Weinberg). He further determined in deficiency notices to the several corporations that they were entitled, collectively, to only one surtax exemption. The deficiencies determined against them result entirely from this adjustment. He made no changes in the income and expenses reported by the corporations in their returns.

29. Income tax returns for the several corporations for their respective fiscal years ending in 1955 were all filed on the same date, October 17, 1955. For some of the corporations the returns were timely and for others, including A. W., Best, Brookside, Imperial, Lettuce, Parsons, Shannon, and Vegetable, they were delinquent. The reasons given for the belated filings was that petitioner was in Europe at the time for filing and his accountant, who had been instructed to file the returns, negligently failed to do so.

30. The stipulated facts are included herein by this reference.

Marshall D. Davis,
Commissioner.

APPENDIX D.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Commissioner of Internal Revenue, Petitioner, vs., Sugar Daddy, Inc., et al., Respondents.

Adolph Weinberg, et al., Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Sugar Daddy, Inc., et al., Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 21213.

Upon Petition to Review a Decision of The Tax Court of the United States, ...

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States .....
and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decisions of the said Tax Court of the United States in this Cause be, and hereby are affirmed in part and remanded to the said Tax Court for recomputation under Rule 50 in accordance with the opinion of this Court.

Filed and entered Nov. 28, 1967.

APPENDIX E.

Internal Revenue Code of 1954, Section 351 (a):

(a) GENERAL RULE.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

APPENDIX F.

Tax Court Rules of Practice, Rule 31 (b):

* * *

(1) *Stipulations required.*—The Court expects the parties to stipulate evidence to the fullest extent to which complete or qualified agreement can be reached including all material facts that are not or fairly should not be in dispute.

* * *

(4) *Objections.*—Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court will consider any objection to stipulated facts made at the trial. [*As amended Jan. 15, 1957.*]

* * *

(6) *No evidence received to alter or contradict.*—The Court may set aside a stipulation in whole or in part where justice requires, but otherwise will not receive evidence tending to qualify, change, or contradict any fact properly introduced into the record by stipulation.

APPENDIX G.

U. S. Treasury Department
Internal Revenue Service
Office of Regional Commissioner

Apr 12, 1961

In Reply Refer to Ap:LA:AA-DRR (BVH) 90-D.
Taxable Year Ended 12-31-1955. 12-31-1956.

Deficiency	$316,348.02
	105,149.08
Total	$421,497.10

CERTIFIED MAIL
Mr. Adolph Weinberg and
Mrs. Etta Weinberg
Husband and Wife
12948 South Pioneer Boulevard
Norwalk, California

Dear Mr. and Mrs. Weinberg:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your income tax liability for the above-noted taxable year(s) discloses a deficiency (or deficiencies) in the amount(s) shown above. The attached statement shows the computation of the deficiency or deficiencies. IF YOU AGREE to this determination, please sign the enclosed agreement, Form 870, and return it promptly to this office. An addressed envelope is enclosed for this purpose. The signing and filing of this agreement will permit an early assessment of the deficiency or deficiencies and will limit the accumulation of interest.

IF YOU DO NOT AGREE, and do not sign and return the enclosed form, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of ninety days from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner
By (Signed) Hugo C. Burns
Associate Chief

Enclosures:
Statement
Agreement, Form 870
Addressed envelope

DRRobinson:cms
3-14-1961

STATEMENT

Mr. Adolph Weinberg and
Mrs. Etta Weinberg
Husband and Wife
12948 South Pioneer Boulevard
Norwalk, California

Tax Liability for the Taxable Years Ended
December 31, 1955 and December 31, 1956

INCOME TAX

Year	Deficiency
1955	$316,348.02
1956	105,149.08
Total	$421,497.10

In making this determination of your income tax liability, careful consideration has been given to the report of examination forwarded to you July 27, 1959, to your protest filed November 27, 1959 and to the statement made at the conferences held October 4 and October 11, 1960.

A copy of this letter and statement has been mailed to your representative, Mr. Chris G. Demetriou, 1015 Wilshire Boulevard, Los Angeles 17, California, in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO TAXABLE INCOME

Taxable Year Ended December 31, 1955

Taxable income disclosed by return	$103,968.47
Additional income:	
(a) Partnership income increased	383,251.60
Taxable income adjusted	$487,220.07

EXPLANATION OF ADJUSTMENT

(a) Examination of the books and records of the partnership known as Adolph and Etta Weinberg discloses that the distributable income reported by you in the taxable years 1955 and 1956 was understated in the respective amounts of $383,251.60 and $144,366.64. These amounts, represented by the following items, have, therefore, been included in taxable income.

	1955	1956
(1) Income from crop sales	$380,831.04	$138,982.66
(2) Other partnership income	2,420.56	5,383.98
Total	$383,251.60	$144,366.64

1(a) It has been determined that the following controlled corporations

A. W. Farming Co.
Best Lettuce Co.
Brookside Farms, Inc.
Chief Farms, Inc.
Gold Farms, Inc.
Imperial Lettuce Farms, Inc.
Lettuce Farming Co.
Lion Farms, Inc.
Parsons Farms, Inc.
Shannon Farms, Inc.
Sugar Daddy, Inc.
Vegetable Farming Co.
Girard Farming Co.
E. T. Farming Co.

are not recognizable for Federal tax purposes and that the income reported by them is properly reportable by the partnership which was the entity which actually created, earned and controlled such income.

1(b) In the alternative, should it ultimately appear that the fourteen corporations are tax-worthy entities, and inasmuch as the partnership performed the services and incurred all of the expenses attributable to the matured crops which were transferred to the fourteen corporations, the sales proceeds should be imputed to the partnership in order clearly to reflect income.

1(c) As a further alternative, if it should be determined that the sales proceeds were properly reported by the fourteen corporations, then the costs of raising the crops should be imputed to the corporations and offset against the sales proceeds in order clearly to reflect income.

(2) It has been determined that the Adolph and Etta Weinberg partnership had income in the years 1955 and 1956 in the respective amounts of $2,420.56 and $5,383.98 as a member of a partnership with Stafford Hannon.

COMPUTATION OF TAX
Taxable Year Ended December 31, 1955

Taxable income adjusted	$487,220.07
Less: Net long-term capital gain	74,007.64
Balance subject to surtax and normal tax	$413,212.43
Partial tax	$325,663.31
Add: 50% of $74,007.64	37,003.82
Alternative tax	$362,667.13
Less: Dividends received credit, per return	6.20
Balance	$362,660.93
Add: Self-employment tax, per Exhibit A	126.00
Income tax liability	$362,786.93
Income tax liability per return, Account No. BF 1032570 Los Angeles District	46,438.91
Deficiency	$316,348.02

ADJUSTMENT TO TAXABLE INCOME

Taxable Year Ended December 31, 1956

Taxable income disclosed by return	$ 38,240.54
Additional income:	
(a) Partnership income increased	144,366.64
Taxable income adjusted	$182,607.18

EXPLANATION OF ADJUSTMENT

(a) This adjustment has been explained above.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1956

Taxable income adjusted	$182,607.18
Less: Net long-term capital gain	2,267.27
Balance subject to surtax and normal tax	$180,339.91
Partial tax	$117,535.72
Add: 50% of $2,267.27	1,133.64
Alternative tax	$118,669.36
Less: Dividends received credit, per return	14.20
Balance	$118,655.16
Add: Self-employment tax, per Exhibit A	None
Income tax liability	$118,655.16
Income tax liability per return, ACCOUNT No. BF 1046190 Los Angeles District	13,506.08
Deficiency	$105,149.08

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1389

ADOLPH WEINBERG AND ETTA WEINBERG, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners are husband and wife who engaged in extensive farming operations in the Imperial Valley of California. Until 1955, they conducted these operations through a partnership. In 1955, they established twelve separate corporations to which they planned to transfer their unharvested crops. The necessary papers for incorporation were filed with the Secretary of State of California and all of the stock in the corporations was issued to petitioners at the end of 1955 or in early 1956. Agents whom the partnership had previously designated harvested the crops in 1955 and 1956 in the ordinary course. The buyers of the crops, at petitioners' instructions, drew drafts payable to the

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cash and farm crops" (Pet. App. 22), the central legal issue, as stated in the petition in the Tax Court, was whether "the income reported by each of the corporations was properly reportable by the Adolph and Etta Weinberg Partnership or by the petitioners" (Pet. App. 16).[1] At the outset of the trial, counsel for the Commissioner stated (Pet. App. 17):

> Respondent expects the evidence in this case to show that neither harvested nor unharvested crops were transferred to these corporations but rather the proceeds from the sale of these crops were given to the corporations as capital.

The Tax Court thus construed the pre-trial stipulation as reflecting only the nominal consideration for the stock (Pet. App. 23), a construction more consistent with the actual facts than is the construction unsuccessfully urged by petitioners in the courts below.

Alternatively, the Tax Court simply dismissed the stipulation as being erroneous and refused to be bound by it, a proper practice, see *Carnegie Steel Co.* v.

[1] The reference to "the matured crops which were transferred to the fourteen corporations," which appears in the supporting statement to the Commissioner's notice of deficiency (Pet. App. 46), cannot operate to shift to the Commissioner the burden of proving the correctness of the determination, as petitioners contend (Pet. 26). The Commissioner is not confined to the theory stated in his notice; he may sustain the determination upon different facts and the burden of proving the incorrectness of the determination remains with the taxpayer. *Standard Oil Co.* v. *Commissioner*, 43 B.T.A. 973, affirmed, 129 F. 2d 363 (C.A. 7), certiorari denied, 317 U.S. 688; *Estate of Scharf*, 38 T.C. 15 (1962), affirmed, 316 F. 2d 625 (C.A. 7); see also 9 Mertens, *Law of Federal Income Taxation*, Sec. 50.63 (1968).

Cambria Iron Co., 185 U.S. 403, 444, long established in the Tax Court itself.[3] Petitioners had notice of the Commissioner's position by the outset of trial. Any surprise warranted, at most, a continuance, which petitioners did not seek.

3. The decision in this case also may be sustained on the alternative ground stated by the Tax Court, but not reached by the court of appeals: if the crops were transferred to petitioners' corporations, the transfers effected an assignment of income from the sales of the crops which should be attributed to petitioners. Because "[p]ractically all of the services contributing to the production of the income were performed by petitioner or those representing the partnership" (Pet. App. 24)[4], the transfers accomplished nothing more that the kind of diversion of the right to receive cash that this Court has held should not be accorded tax significance. Compare *Harrison* v. *Schaffner*, 312 U.S. 579; *Helvering* v. *Horst*, 311 U.S. 112; *Helvering* v. *Eubank*, 311 U.S. 122.

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[3] See Rules of Practice, Tax Court of the United States (Rev. 1958, 1965 ed.), Rule 31(b); *Seatree* v. *Commissioner*, 25 B.T.A. 396; *Bingham Trust* v. *Commissioner*, 2 T.C. 853; *Gunderson Bros. Engineering Corp.* v. *Commissioner*, 42 T.C. 419.

[4] This finding—with which petitioners never deal—makes irrelevant the authorities discussed at pp. 28–35 of the petition.

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
GILBERT E. ANDREWS,
LOUIS M. KAUDER,
Attorneys.

JUNE 1968.

[5] If the court denies taxpayers' petition, the Commissioner's protective petition in *Commissioner* v. *Sugar Daddy, Inc.*, No. 1364, this Term, should also be denied. If the present petition is granted, however, the protective petition in No. 1364 should also be granted for the reasons stated therein.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 1389

ADOLPH WEINBERG and ETTA WEINBERG,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Pursuant to the provisions of Rule 24 of Revised Rules of the Supreme Court of the United States, 28 U.S.C.A., this reply brief is filed and is addressed to the arguments first raised in Point 2 (pages 3, 4 and 5) of Respondent's Memorandum in Opposition.

The Tax Court, notwithstanding the assertions by the Commissioner in the notice of deficiency and a written stipulation that petitioners transferred matured farm crops to various corporations, considered, for the first time after trial, the issue of whether farm crops were transferred, imposed the burden of proof upon petitioners to establish that farm crops were transferred and determined that petitioners failed to establish the transfer of farm crops.

Respondent seeks to excuse the Tax Court's disregard of the notice of deficiency and written stipulation and consideration of the issue for the first time after trial, on the grounds: first, that the Commissioner is permitted, for the first time after trial, to abandon his assertions that farm crops were transferred and substitute an assertion that cash was transferred; and, second, that in any event petitioners' remedy for this sudden change was a request for continuance of the trial.

To characterize the Commissioner's abandonment of the assertions of transfer of farm crops in the notice of deficiency and stipulation as a permissible change in the theory whereby the deficiency is assessed is to ignore the difference between permissible changes in legal theories based upon a constant assertion of ultimate fact and this situation where petitioners' proof, at the trial, was addressed to the ultimate facts placed in issue by the notice of deficiency and written stipulation and thereafter the Commissioner urged the Tax Court to disregard the notice of deficiency and stipulation and consider as an issue whether cash as distinguished from farm crops was transferred.

The cases and text cited by respondent in footnote 2 on page 4 of the Memorandum for the Respondent in Opposition do not stand for the proposition that the Commissioner may, after trial, abandon the assertions of ultimate fact contained in the notice of deficiency and stipulation. Where the Commissioner asserts a transfer of matured farm crops in his notice of deficiency and stipulates that farm crops were transferred and for the first time, after trial, requests the Tax Court to disregard the stipulation and find that

cash, not farm crops, was transferred, he seeks to accomplish a result by a method condemned by this court in *Helvering v. Tex-Penn Co.*, 300 U.S. 481 at 498, 81 L. Ed. 755.

> "The taxpayers were entitled to know the basis of law and fact on which the Commissioner sought to sustain the deficiencies."

The petitioners should be under no obligation to support by evidence an ultimate fact of transfer of farm crops when the Commissioner in his notice of deficiency and written stipulation so asserts. *Security First National Bank of Los Angeles*, 28 B.T.A. 289. And in *Harbor Plywood Corp. v. Comm'r* (C.A. 9th 1944), 143 F. 2d 780:

> "This court will not consider in support of a deficiency assessment, reasons not advanced by the Commissioner in his deficiency notice or before the Board of Tax Appeals especially when the taxpayer has been deprived thereby of the opportunity to present evidence material thereto."

Respondent's argument that petitioner's remedy was to request a continuance of the trial is not only inadequate in attempting to reach a fair result but is misleading in its factual assertions of the sequence of events.

Contrary to respondent's assertion in its Memorandum in Opposition, the Commissioner, after trial, for the first time argued that cash proceeds from the sale of farm crops were transferred to the corporations and that the stipulation to the contrary should be disregarded.

The Tax Court clearly so states in its opinion:

> ". . . we have determined, that the proceeds from the sale of the crops, rather than growing or matured crops themselves, were transferred to the corporations by petitioners in exchange for their stock. *Respondent makes this argument, for the first time, in his final brief and further argues that the stipulation to the contrary should be disregarded.*" (Emphasis added).

At the commencement of the trial petitioners' counsel stated to the court:

> "We feel that in our stipulation of facts that we have a stipulation that the petitioners Adolph and Etta Weinberg did transfer property in the form of farm crops to a number of these corporations . . ."

At no time during the course of trial did respondent dispute the statement, refer at all to the stipulation, indicate to the trial court that the stipulation provided otherwise, or request the stipulation be disregarded.

Commissioner Davis, who tried the case, set forth in his "Report of Commissioner" (see Appendix C to Petition for a Writ of Certiorari), "It is stipulated that the stock of all the corporations except ET and Girard was issued 'in exchange for said $1000 and farm crops.'"

Respondent's first attempt to avoid the plain language of the stipulation occurred in final brief (Respondent's Exceptions to the Commissioner's Findings of Fact and Reply Brief) where respondent states (p. 9):

> "Respondent submits that the portion of the stipulation of facts involved here is both incorrect and a conclusion of law which is not binding upon the Court."

Petitioners, therefore, had no occasion to request relief from this action until after the receipt of the decision of the Tax Court. Thereupon petitioners filed a timely Motion to Reopen the Proceedings to Receive Additional Evidence, the grounds for which were "In that the Tax Court considered as an issue of fact, whether proceeds from the sale of farm crops rather than farm crops as such were transferred, by the individual petitioners to the several petitioner corporations notwithstanding an express written stipulation of fact that farm crops had been so transferred and notwithstanding an affirmation of fact that farm crops had been transferred in the notice of deficiency . . ." This motion is proper where the issue determined by the Tax Court was not one to which the parties, in light of the notice of deficiency and stipulation, addressed their proofs at trial. *Helvering v. Edison Securities Corp.*, 78 F. 2d 85 (4th Cir. 1939), 35-2 U.S.T.C. Para. 9425.

The Tax Court denied the motion.

Respondent did not file any objection to petitioners' motion to reopen the proceedings.

Thus, this is not a case, as respondent argues, where petitioners' remedy was a motion for continuation at the beginning of the trial.

In addition to the significance of the sequence of events which is set forth above, the respondent's assertion in his brief to the Tax Court that the stipulation of transfer of farm crops is a conclusion of law, is significant.

Respondent, in arguing to the Tax Court for relief from the stipulation, asserts the stipulation of transfer

of crops is one of law, and thus beyond the power of the parties. But respondent, having once persuaded the Tax Court to disregard the stipulation, then argues to the Court of Appeals and to this Court that the issue of whether farm crops were transferred is really one of fact as distinguished from law. Having spun a tangled web of inconsistent positions, respondent must now admit that if the issue of transfer of farm crops is one of fact then the notice of deficiency and stipulation unequivocally establish the fact and eliminate the issue from consideration by the Tax Court and that petitioners reasonably and justifiably conducted the trial of the case on that assumption and that the subsequent disregard by the Tax Court has deprived petitioners of a fair trial. If, on the other hand, respondent would again argue that the issue is one of law, then it follows that the issue was not before the Tax Court by reason of the notice of deficiency and stipulation and the petitioners were deprived of a fair trial when the Tax Court first considered the issue after trial and, further, that the appellate court erred in failing to extend its review to questions of law.

Respectfully submitted,

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's order dated June 17, 1968, denying the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and, in support thereof, respectfully shows:

Grounds for Rehearing.

A. This Is a Proper Matter for Review on Certiorari.

There are "substantial grounds available to petitioner although not previously presented." Rule 58(2).

Specifically, these substantial grounds, not presented to the Court in the prior petition for writ of certiorari, are:

(1) That the United States Court of Appeals for the Ninth Circuit has so far *sanctioned a de-*

parture by the Tax Court of the United States from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and

(2) That the United States Court of Appeals for the Ninth Circuit has *itself so far departed* from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Tax Court (notwithstanding the assertions by the Commissioner in the notice of deficiency and a written stipulation that petitioners had transferred farm crops to various corporations) considered for the first time *after* trial the issue of whether the farm crops were transferred. The Tax Court then determined that *the burden of proof* should be upon petitioners to establish that these farm crops were transferred, and determined that petitioners had *failed to meet this burden of proof*. Petitioners had no occasion to know until after the trial that this stipulated matter was even in issue.

Petitioners had no occasion to request relief from this action until after the receipt of the decision of the Tax Court. Thereupon, petitioners filed a timely Motion to Reopen the Proceedings to Receive Additional Evidence, since the issue determined by the Tax Court was not one to which the petitioners, in light of the notice of deficiency and stipulation, had addressed their proofs of trial. The Tax Court denied the motion. The petitioners were, therefore, deprived of an opportunity to present evidence upon a material issue which they could reasonably have assumed not to have been in dispute. By so doing, the Tax Court departed from the accepted and usual course of judicial proceedings.

The United States Court of Appeals for the Ninth Circuit *sanctioned this departure* by failing to consider this issue on appeal. In fact, the Court of Appeals affirmed the Tax Court's decision "on the ground that the Tax Court was not clearly wrong in determining that the *taxpayers failed to establish* that they had transferred growing, unharvested crops."

The Court of Appeals thereby not only *sanctioned* this departure, they *adopted* it.

B. The Tax Court Departed From the Accepted and Usual Course of Judicial Proceedings.

The usual course of judicial proceedings for the Tax Court is, with respect to matters set forth in written stipulations, established by Rules of Practice of the Tax Court. These rules provide in part, Rule 31(b)(4) and 31(b)(6) that objections to a stipulation are required to be made in the stipulation or at the trial. As stated in the opinion of the Tax Court and as conceded by the Commissioner:

> "Respondent makes this argument, [that proceeds from the sale of the crops, rather than growing or matured crops themselves, were transferred to the corporations in exchange for their stock] for the first time, in his final brief and further urges that the stipulation to the contrary should be disregarded." [Opinion of the Tax Court 44 T.C. 233]

As was stated in *General Utilities & Operating Company v. Helvering*, 296 U.S. 200, 56 S. Ct. 185:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

C. The Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings.

The usual course of judicial proceedings on appellate review is not to affirm a deficiency assessment where the issues actually determined by the Tax Court were not raised by the notice of deficiency or otherwise at the trial before the Tax Court.

> "This court will not consider in support of a deficiency assessment, reasons not advanced by the Commissioner in his deficiency notice or before the Board of Tax Appeals, especially when the taxpayer has been deprived thereby of the opportunity to present evidence material thereto." *Harbor Plywood v. Comm'r,* (C.A. 9th 1944) 143 F. 2d 780.

The Court of Appeals did affirm the decision of the Tax Court on the issue of whether the *taxpayers had failed to establish* that they had transferred growing, unharvested crops. The deficiency assessment was supported on review in a situation where the taxpayers had been deprived of an opportunity to present evidence material to an issue of whether farm crops were transferred, the Court of Appeals thereby departing from the usual course of appellate review.

Conclusion.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

ERNEST GEORGE WILLIAMS,
DEMETRIOU & DEL GUERCIO,
RICHARD A. DEL GUERCIO,
RONALD J. DEL GUERCIO,
Attorneys for Petitioners.

Certificate of Counsel.

I, the undersigned, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

ERNEST GEORGE WILLIAMS,
DEMETRIOU & DEL GUERCIO,
RICHARD A. DEL GUERCIO,
RONALD J. DEL GUERCIO,
Attorneys for Petitioners.

APPENDIX

APPENDIX A.

Tax Court Rules of Practice, Rule 31 (b):

* * *

(1) *Stipulations required.*—The Court expects the parties to stipulate evidence to the fullest extent to which complete or qualified agreement can be reached including all material facts that are not or fairly should not be in dispute.

* * *

(4) *Objections.*—Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court will consider any objection to stipulated facts made at the trial. [*As amended Jan. 15, 1957.*]

* * *

(6) *No evidence received to alter or contradict.*—The Court may set aside a stipulation in whole or in part where justice requires, but otherwise will not receive evidence tending to qualify, change, or contradict any fact properly introduced into the record by stipulation.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1364

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SUGAR DADDY, INC., ET AL.

PETITION FOR REHEARING

On June 17, 1968, the Court denied our petition for certiorari herein. That petition was filed solely to protect the revenue in the event that this Court granted certiorari in *Weinberg* v. *Commissioner,* No. 1389, October Term 1967, where certiorari also was denied on June 17.

We have been informally advised that a petition for rehearing will be filed in *Weinberg.* To protect the revenue, the Commissioner of Internal Revenue requests a rehearing of the denial of certiorari in this matter, but only if a petition for rehearing is filed and granted in *Weinberg.* See Section 7481(2)(B) of the Internal Revenue Code and *R. Simpson & Co.* v. *Commissioner,* 321 U.S. 225. If no petition for rehearing is filed in *Weinberg,* or if such petition, if

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filed, is denied, this petition for rehearing should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1968.

CERTIFICATE OF COUNSEL

Pursuant to Rule 58(2) of the Rules of this Court, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is limited to intervening circumstances of substantial or controlling effect.

ERWIN N. GRISWOLD,
Solicitor General.

U.S. GOVERNMENT PRINTING OFFICE: 1968